Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, ET AL.,

Appellants,

—v.—

JOHN MONTGOMERY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED JULY 7, 1969
PROBABLE JURISDICTION NOTED NOVEMBER 10, 1969

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEWIS v. STARK, Civ. No. 50238

PERCY v. MONTGOMERY, Civ. No. 50285

RELEVANT DOCKET ENTRIES
(Combined List)

Date 1968		PROCEEDINGS
Oct.	31	Filed complaint and issued summons [No. 50238].
	31	Ordered, after statement by counsel for respective parties, the temporary restraining order to issue and case continued to Nov. 12, 1968 at 10 A.M. for further hearing. (Wollenberg) [No. 50238].
Nov.	5	Filed notification and certification for a three judge court. (Wollenberg) [No. 50238].
	8	Filed Order convening three judge court consisting of Judges O. D. Hamlin, Albert C. Wollenberg, Alfonso J. Zirpoli. (Chambers CJ.) [No. 50238].
	12	Ordered, after hearing, the temporary restraining order dissolved and hearing on injunction set for Nov. 26, 1968, at 10 A.M. before three judge court (Wollenberg) [No. 50238].
	12	Filed complaint and issued summons [No. 50285].
	13	Ordered, after hearing, the petition for temporary restraining order denied and case set for hearing before a three judge court on Nov. 26, 1968, at 10 A.M. on injunction [No. 50285].
	13	Filed notification and certification to the Hon. Richard H. Chambers to convene a three judge court (Wollenberg) [No. 50285].
	18	Filed order convening three judge court consisting of Judges O. D. Hamlin, CJ; Albert C. Wollenberg and Alfonso J. Zirpoli, DJ's (Chambers, CJ) [No. 50285].

Date 1968	PROCEEDINGS
Nov. 21	Filed motion by Debra, Julia, Liza and Larry Jacobs to intervene as party plaintiffs, motion for temporary restraining order and preliminary injunction, with affidavit, memorandum and copy of proposed complaint in intervention attached.
21	Filed order that hearing on motion of Debra, Julia, Liza and Larry Jacobs to intervene as party plaintiffs is set for hearing on Tuesday, Nov. 26, 1968, at 10 A.M.; that the motion and all other moving papers shall be served upon counsel for defendants on or before Nov. 21, 1968, at 5 P.M. (Wollenberg).
22	Filed notice and motion by Bertha Bell on behalf of herself and her oldest five minor children, John, Thomas, Patricia, and Rosemarie Bolden, and Alberta Conrad, and Haywood Bell on behalf of himself, for declaratory judgment, temporary restraining order, preliminary injunction and leave to intervene as party plaintiffs, with order shortening time (Wollenberg) and supporting papers attached. (Hearing Nov. 26, 1968, at 10 A.M.)
22	Filed notice and motion by Mary J. Garner, aka Mary J. Garcia on behalf of herself and her minor children, Ennis, Gary, Linda and Richard Garner, and Humberto Garcia on behalf of himself and his minor child, Marion Garcia, for temporary restraining order, preliminary injunction and leave to intervene as plaintiff, with order shortening time (Wollenberg) and supporting papers attached. (Hearing Nov. 26, 1968.)
22	Filed notice and motion by defendants to dismiss and to dissolve three judge court; return to motion for preliminary injunction; memorandum of points and authorities [No. 50238].
22	Filed notice and motion by defendants to dismiss complaint and to dissolve three judge court, return to motion for preliminary injunction, Nov. 26, 1968, at 10 A.M., with order shortening time (Weigel) and supporting papers attached [No. 50285].

Date 1968	PROCEEDINGS
Nov. 26	Ordered, after three judge hearing, case No. 50238 and case No. 50285 are consolidated for this hearing; proposed order be submitted; memoranda to be submitted including all reference material; the motions and the State's motion to join the U.S. stand submitted (Hamlin, CJ; Wollenberg and Zirpoli, DJ's).
Dec. 23	Filed memorandum opinion, dismissing complaint and dissolving the three judge court (Judges Hamlin, Zirpoli and Wollenberg).
1969	
Jan. 2	Filed motion by plaintiffs to vacate memorandum order dismissing complaint and dissolving three judge court and motion for rehearing (to ACW).
10	Filed notice and motion by Wilbur J. Cohen, Secretary of Department of H.E.W. to intervene, Feb. 13, 1969, at 10 A.M., with copy of proposed complaint in intervention, attached.
Mar. 7	Ordered, after hearing on motion for rehearing, motion to vacate order dismissing and motion to intervene, submitted (Wollenberg).
12	Filed order denying motion to vacate memorandum order dismissing complaint and dissolving three judge court and motion for rehearing (Hamlin, Wollenberg and Zirpoli).
12	Filed order denying motion to intervene as to Wilbur J. Cohen (Hamlin, Wollenberg and Zirpoli).
May 8	Filed plaintiffs' joint notice of appeal to Supreme Court of the United States.
8	Filed plaintiffs' request for certification and transmission of record to the Supreme Court of the United States.
June 11	Made, mailed Record on Appeal to Supreme Court of United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 50238

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, PLAINTIFF

vs.

PAULINE STARK, SUSAN GOODFELLOW; HRAYR TERZIAN; JOHN C. MONTGOMERY; ALAMEDA COUNTY WELFARE DEPARTMENT; STATE DEPARTMENT OF SOCIAL WELFARE; STATE OF CALIFORNIA, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff alleges:

I

This action arises under the Act of April 20, 1871, 17 Stat. 13, U.S.C. Title 42, Sec. 1983, as hereinafter more fully appears. It arises also under the Constitution of the United States, Article VI, Sec. 2, under the First, Ninth and Section 1 of the Fourteenth Amendments to the Constitution of the United States, and under the Act of 1935, 49 Stat. 627, U.S.C. Title 42, Secs. 601, 602 and 606 as hereinafter more fully appears. The matter in controversy between defendants and the class represented by plaintiff exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

II

This action seeks to declare void and to enjoin operation of a state statute and an administrative regulation on the grounds that their enforcement will deprive plaintiff and her dependent children right, privileges and immunities secured by the Constitution and laws of the

United States. Jurisdiction is vested in this Court by U.S.C. Title 28, Secs. 1331(a), 1343(3) and 1343(4) and insofar as declaratory relief is sought, under U.S.C. Title 28, Secs. 2201 and 2202.

III

Plaintiff is a citizen of the United States. She is the mother and general guardian of two minor children, ANNETTE LEWIS and MANUEL LEWIS, who are citizens of the United States and reside with plaintiff in the City of Berkeley, County of Alameda, State of California. All are recipients of federal aid to families with dependent children (AFDC). Plaintiff brings this action on behalf of said children and in her own right as a responsible relative entitled under U.S.C. Title 42, Sec. 606(b) to receive AFDC.

IV

Plaintiff brings this action also on behalf of each California recipient of AFDC whose aid payments have been or are about to be reduced by defendants or any of them in amounts calculated from the income of any person who is neither the parent or adoptive stepparent of the dependent child nor the spouse of the mother, without proof that such income is actually available to such recipient. The members of the class are too numerous practically to be joined. Plaintiff's claim is typical of the claims of the class. There are questions of law and fact common to the class, and such common questions predominate over any questions which may affect only individual members of the class. There is no other means available to the class so fair and efficient for adjudicating the controversy as maintenance of this action. Prosecution of this action by plaintiff fairly and adequately protects the interests of the class.

V

Defendants PAULINE STARK and SUSAN GOODFELLOW are social workers employed by defendant ALAMEDA COUNTY WELFARE DEPARTMENT

(hereinafter "COUNTY WELFARE"). Their duties as social workers include computation of the amount of payment to be made to plaintiff as AFDC. Defendant HRAYR TERZIAN is Director of defendant COUNTY WELFARE, and by virtue of that position is responsible for supervision and direction of the performance of their duties by defendants PAULINE STARK and SUSAN GOODFELLOW. Defendant COUNTY WELFARE is an agency of the County of Alameda. The County of Alameda is a political subdivision of defendant STATE OF CALIFORNIA, which is a sovereign member o. the United States, and a State within the meaning of the federal Constitution and of Title 42 of the United States Code. Defendant STATE DEPARTMENT OF SOCIAL WELFARE (hereinafter "STATE WELFARE") is an agency of defendant STATE OF CALIFORNIA, empowered by California law to administer the computation and distribution of AFDC in California, and for that purpose to create regulations of state-wide application having the force of statutory law. Defendant JOHN C. MONTGOMERY is Director of defendant STATE WELFARE, and by virtue of that position is responsible for the execution of the powers of STATE WELFARE.

VI

Defendants and each of them have at all times herein mentioned been engaged in the distribution of AFDC under the federal Social Security Act, U.S.C. Title 42, Secs. 601-610, inclusive. Between June 30, 1968 and the present, plaintiff received such aid from defendants in the amounts shown below.

Month	Family Need as Computed by Defendants	AFDC Payment (State Maximum)
July	$224	$172
August	$199	$172
September	$199	$172
October	$199	$172
November	$199	——

VII

On October 24, 1968, defendant PAULINE STARK stated under oath at a hearing held at the offices of defendant COUNTY WELFARE that she will reduce plaintiff's AFDC payment for November, 1968 to $118.45. On October 29, 1968 one Elaine B. Neel, supervisor of administrative appeals for defendant COUNTY WELFARE stated that plaintiff's AFDC payment for November, 1968 will be so reduced, notwithstanding the fact that plaintiff had filed an administrative appeal. On October 29, 1968, one Margaret Leonard, an attorney for defendant COUNTY WELFARE stated that the AFDC payment to plaintiff for November, 1968 will be so reduced, and that said reduction is correct under State law. Unless enjoined, defendants will reduce plaintiff's AFDC grant by $53.55 for November, 1968, beginning with the payment due November 1, 1968. The actual need of plaintiff's family for AFDC will not decline for November, 1968.

VIII

The reduction of AFDC benefits threatened by defendants is due soley to their administrative determination that income of one Mr. Watson in excess of his personal needs is income to plaintiff and her children. Plaintiff is entitled to, and but for said determination would receive, not less than $172.00 as AFDC for November, 1968. Said determination was made arbitrarily and capriciously, without considering or giving plaintiff any opportunity to present contrary evidence. Said determination will operate to reduce plaintiff's AFDC benefits for November, 1968 and indefinitely thereafter as the direct result of the application and under color of a state-wide regulation, Public Social Services Manual, Sec. 44-133.5, created by defendant STATE WELFARE, which provides:

> The amount the . . . man assuming the role of spouse is able to contribute to the AFDC family is net income to the FBU [family budget unit].

Said regulation is authorized by a California statute, Welfare & Institutions Code Sec. 11351, which provides that where a needy child lives with his mother and an adult male assuming the role of spouse to her, the amount of the AFDC grant:

> shall be computed after consideration is given to the income of . . . such adult male person. The county granting aid shall determine if . . . such adult male person is able to support the child either wholly or in part. . . .

Defendants' administrative determination that Mr. Watson is "assuming the role of spouse" was made soley on the grounds that he lives with plaintiff and her needy children. Defendants' administrative determination that plaintiff and said children are receiving "net income" from Mr. Watson was made soley on the grounds that he should be "able" to contribute to the family on the basis of a formula computation of his personal needs, pursuant to the statute and regulation hereinabove complained of. No defendant has produced or considered any evidence that Mr. Watson has assumed any financial obligation of the family or has contributed to the support of any member of the family, or will so contribute, or has married plaintiff, or has adopted any of her children. Defendants have at all times refused to consider any evidence to the contrary.

IX

Mr. Watson is not married to plaintiff and has adopted none of her children. The money from his income presumed by defendants to be available to plaintiff and her children is in fact not available.

X

On September 16, 1968, shortly after she was informed by a social worker for defendant COUNTY WELFARE that Mr. Watson's income would be considered income to her family, plaintiff requested a formal administrative hearing. The hearing was had on October 24, 1968,

before one William T. Coughlin, a referee for defendant STATE WELFARE, who declared that review would be confined to the accuracy of computations under the State regulation. Neither that hearing, nor any review procedure based upon it, nor any other administrative remedy will permit plaintiff to show that the income presumed to be received by her and her children is actually fictitious, or that the statute and regulation by whose operation her AFDC payment will be reduced are in conflict with federal law, or any issue other than conformity of the threatened reduction with State law. Defendants have refused to stay reduction of plaintiff's AFDC payment. There is no adequate or speedy remedy at law by which plaintiff can obtain relief.

XI

Plaintiff and her children are destitute, except for AFDC. They need every dollar of their $172.00 monthly grant, although that amount is itself insufficient to meet all their actual needs. If the grant is reduced, plaintiff and her children will be deprived of necessaries of life. Subsequent correction of the grant will not repair the harm caused by such deprivation.

XII

Defendants and each of them are aware that the threatened reduction of plaintiff's AFDC is contrary to the provisions of federal law made and provided to deal with deductions based on income to a "man assuming the role of spouse." Since August, 1968, defendants have been on notice of the provisions of 42 C.F.R. Sec. 203.1 (Exhibit A attached hereto), and have wilfully and maliciously elected not to comply.

WHEREFORE PLAINTIFF RESPECTFULLY PRAYS:

1. That this Court temporarily restrain defendants and each of them from deducting from plaintiff's AFDC payment any amount representing the income of any

person other than plaintiff or her children, unless such income be actually contributed to their support.

2. That this Court enter its Order that plaintiff's action is to be maintained as a class action and direct actual notice to each member of the class.

3. That this Court convene a three-judge panel pursuant to U.S.C. Title 28, Secs. 2281 and 2284.

4. That the Court enter a preliminary injunction, to become final upon determination of this action, restraining defendants and each of them from deducting from any AFDC payment a sum based on income of any person other than the recipient, the needy children, the spouse of the recipient, or the natural or adoptive parent of the needy children, unless such income be actually contributed to the support of the recipient family.

5. That the Court declare that California Welfare & Institutions Code Sec. 11351 and California Public Social Services Manual Sec. 44-133.5 are null and void, and of no effect insofar as they purport to authorize such deductions.

6. That the Court award plaintiff attorney's fees.

7. That the Court grant such other relief as it deems just and proper.

Dated this 30th day of October, 1968.

CAROL RUTH SILVER
R. CORBIN HOUCHINS
ELIZABETH A. TPUNINGER

By

R. CORBIN HOUCHINS
Attorneys for Plaintiff

[Notarized Verification of Genever Lewis omitted in printing.]

EXHIBIT A (to Complaint in Civ. No. 50238)

HEW REGULATION, 45 CODE OF FEDERAL REGULATIONS, SECTION 203.1

Sec. 203.1. Condition of plan approval: bases for determining eligibility of child.

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in para-

graph (a) of this section have been inconsistent with the provision in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.

(Sec. 1102, 49 Stat. 647, Sec. 402, 49 Stat. 627; 42 U.S.C. 1302, 602).

Effective date. The regulations in this part shall be effective on the date of their publication in the *Federal Register*.

[Published on August 8, 1968, at 33 Fed. Reg., No. 154, 11290.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 50285

MARGARET PERCY, individually and on behalf of her minor child, CLEA PERCY, and on behalf of all other individuals similarly situated,

and

MELVIN JONES, individually and on behalf of all other individuals similarly situated, PLAINTIFFS

—*vs*—

JOHN MONTGOMERY, as Director of the State Department of Social Welfare of the State of California, and the STATE DEPARTMENT OF SOCIAL WELFARE; H. D. CHOPE, as Director of the San Mateo County Department of Public Health and Welfare (DPHW), ROBERT D. RIPPETO, as Superintendent of the Social Service Division of the San Mateo County DPHW, ANNA DOBSON and ELLEN HARTY, as employees of the Social Service Division of the San Mateo County DPHW, and the SAN MATEO COUNTY DEPARTMENT OF PUBLIC HEALTH AND WELFARE; STATE OF CALIFORNIA, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND SUMS DUE AND OWING

1. This is an action on behalf of plaintiffs and all others similarly situated for declaratory and injunctive relief authorized by Title 42, U.S.C., § 1983, to secure rights, privileges and immunities guaranteed by Article IV, Paragraph 2, and the Third, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Sections 11 and 21 of the Constitution of the State of California, and by Title IV of the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C.

§§ 601, 602 and 606, and the regulations promulgated thereunder, as set forth in 33 C.F.R., Section 203.1 (See Exhibit A attached hereto).

2. Jurisdiction is conferred on this Court by Title 28, U.S.C., §§ 1343(3) and (4), providing for original jurisdiction of this Court in suits authorized by Title 42, U.S.C., § 1983, and under Title 28, U.S.C., §§ 2201 and 2202, relating to declaratory judgments.

Jurisdiction is further founded on Title 28, U.S.C., § 1331(a), providing for original jurisdiction of this Court in all civil actions wherein the matter in controversy arises under the Constitution and laws of the United States. The matter in controversy between defendants and the class represented by plaintiffs exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

3. This is a proper case for determination by a three-judge court pursuant to Title 28, U.S.C., §§ 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Section 11351 of the California Welfare and Institutions Code (annexed hereto as Exhibit B) and Public Social Services Manual, §§ 42-535 and 44-133.5 (annexed hereto as Exhibit C), for the reason that said statute and regulations are in violation of the provisions of the Social Security Act and the regulations promulgated by the United States Department of Health, Education, and Welfare, and are invalid under the United States and California constitutions.

4. Plaintiff MARGARET PERCY is an adult citizen of the United States. She is the mother and general guardian of her minor child, CLEA PERCY, who is a citizen of the United States and resides with her mother in the County of San Mateo, State of California. Plaintiff MARGARET PERCY brings this action in behalf of said child and in her own right as a responsible relative entitled under Title 42, U.S.C., § 606(b), to receive Aid to Families with Dependent Children (AFDC).

5. Plaintiff MELVIN JONES is an adult citizen of the United States. He resides in the County of San

Mateo, State of California, in the same household as plaintiffs PERCY.

6. Plaintiffs also bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons similarly situated within the State of California. Two distinct classes exist:

(1) Plaintiffs CLEA and MARGARET PERCY represent those dependent children and their mothers who are eligible for and in need of AFDC benefits, but who do not receive such benefits because defendants consider income of a man residing in the household as available to meet plaintiffs' needs despite the facts that such person is neither the parent nor adoptive parent of the dependent child and does not represent himself to be the parent of that child, that such person is not the spouse of the mother, and that such income is not actually available to the dependent child and her mother.

(2) Plaintiff MELVIN JONES represents those persons who reside with the patents of needy children, receiving or applying for AFDC benefits, but who owe no legal duty of support to those children under the law of general applicability in the State of California.

The members of both classes are sufficiently numerous that joinder of all members is impracticable. There are questions of law and fact common to the respective classes. The claims of the respective representative parties are typical of the claims of their classes. There is no other means available to the classes so fair and efficient for adjudicating the controversy as maintenance of this action. The representative parties will fairly and adequately protect the interests of their respective classes.

7. Defendant STATE OF CALIFORNIA is a sovereign member of the United States, and a State within the meaning of the Federal Constitution and of Title 42 of the United States Code. Defendant STATE DEPARTMENT OF SOCIAL WELFARE (hereinafter "SDSW") is an agency of defendant STATE OF CALIFORNIA, empowered by California law to administer the computation and distribution of AFDC in California, and for that purpose to create regulations of state-wide application having the force of statutory law. Defendant

JOHN C. MONTGOMERY is Director of defendant SDSW, and by virtue of that position is responsible for the execution of the powers of SDSW.

8. Defendant H. D. CHOPE, as the Director of defendant SAN MATEO COUNTY DEPARTMENT OF PUBLIC HEALTH AND WELFARE (DPHW), and ROBERT D. RIPPETO, as the Superintendent of the San Mateo County DPHW, are responsible for the administration of the AFDC program in the County of San Mateo. Defendants ANNA DOBSON and ELLEN HARTY are social workers employed by defendant DPHW, whose duties as social workers include the determination of eligibility of applicants for the AFDC program. Defendant DPHW, as an agency of the County of San Mateo, a political subdivision of defendant STATE OF CALIFORNIA, is authorized by law to implement and administer the AFDC program within said county.

9. Defendants and each of them have at all times herein mentioned been engaged in the administration of the AFDC program under the Social Security Act, Title 42, U.S.C., Sections 601-610, inclusive. On or about October 8, 1968, plaintiff, MARGARET PERCY, on behalf of her daughter, CLEA PERCY, attempted to make application for AFDC benefits. Plaintiff PERCY was told by defendant DOBSON that such an application for AFDC benefits would be to no avail. Defendant DOBSON acted pursuant to, and under color of, state-wide regulations promulgated by defendants SDSW and MONTGOMERY under the California Welfare and Institutions Code, Section 11351 (set forth in full in Exhibit B) attached hereto).

10. Specifically, defendants denied AFDC benefits to plaintiffs PERCY under Public Social Services Manual (PSSM), Sections 42-535 et. seq. (set forth in Exhibit C attached hereto), which provide, in relevant part, that a man alleged to be assuming the role of spouse to a mother of children applying for AFDC benefits "is responsible for the support of . . . [t]o the extent of his ability, the mother and her needy children." PSSM, § 42-535.22.

PSSM, § 44-133.5 (Exhibit C attached hereto) requires the inclusion of the entire net income of a man alleged to be assuming the role of spouse as income assumed

available to meet the needs of the mother and her needy children except for the limited deductions permitted according to assistance standards as set forth in PSSM, § 44-113.

11. Effective August 8, 1968, the Secretary of Health, Education, and Welfare (HEW) made applicable to states receiving federal grants-in-aid for AFDC programs revised regulations regarding stepfather and "man-in-the-house" policies. [See Exhibit A attached hereto.]

Said regulations rendered invalid stepfather and man-in-the-house budgetary rules which impute income to recipients of or applicants for AFDC benefits unless that income is available *in fact*, except where a state law of general applicability imposes a legal duty to support those needy children upon the stepfather or man-in-the-house.

12. On or about October 11, 1968, plaintiff MARGARET PERCY renewed her application to defendant DPHW for AFDC benefits on behalf of her minor needy child, CLEA PERCY, on the advice of her attorneys that defendants' regulations and Section 11351 were unconstitutional and in direct violation of federal law, because there was no law of general applicability imposing any support duty upon plaintiff JONES. Subsequent to that application, plaintiffs and their attorneys spoke on numerous occasions with defendants DOBSON and HARTY advising them of the invalidity of the existing budgetary rules. Nevertheless, on or about November 6, 1968, the application was denied due to defendants' determination that the income from the employment of plaintiff JONES sufficiently meets the needs of, and is deemed available to plaintiffs MARGARET and CLEA PERCY. [A copy of the letter of denial is attached hereto as Exhibit D.] The needs of MARGARET and CLEA PERCY amount to $192.00 per month according to the standards of defendant SDSW.

13. Plaintiff JONES' ability to support is determined solely from the fact that his net income meets the needs of MARGARET and CLEA PERCY, according to the computations by defendants made pursuant to the statute and regulations hereinabove complained of. Defendants' computations operate on the conclusive presumption that the expenses of plaintiff JONES are limited to the public

assistance standards established for determining the expenses of welfare recipients. Defendants refuse to consider evidence showing that Mr. Jones is in fact financially obligated for expenses beyond those recognized by defendants' standards. Plaintiff JONES earns approximately $370 per month and has current expenses approximating $400 per month.

Defendants' administrative finding that Mr. Jones is "assuming the role of spouse" was made solely on the grounds that he lives in the same household with plaintiff and her needy child. No defendant has produced any evidence that Mr. Jones has assumed substantial financial responsibility for the family or that he has adopted the minor child or in any fashion assumed a parental role toward that child. Defendants have at all times refused to consider evidence to the contrary.

14. Plaintiff JONES is not married to plaintiff MARGARET PERCY and has not adopted CLEA PERCY. The money from plaintiff JONES' income presumed to be available to the PERCY family is not in fact available, except that due to the emergency situation created by defendants' refusal to grant AFDC benefits to plaintiffs PERCY, and in disregard of pressing personal needs and the just demands of his creditors, plaintiff JONES has provided food and shelter to the PERCY family. Plaintiff JONES cannot continue to provide for the needs of plaintiffs PERCY and will terminate all support for them as soon as they are found eligible for the AFDC program.

FOR A FIRST CLAIM

15. By reason of the refusal of defendants to grant those individuals represented by plaintiffs PERCY herein that amount of AFDC benefits to which they are otherwise entitled, those plaintiffs are denied their legal rights in that:

(1) The Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., § 601, 602 and 606, requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits

the discrimination effected by defendants in treating that class represented by named plaintiffs herein differently from needy children who live: (a) alone with their mother and whose mother has no such relationship with any man in or out of the house; (b) alone with their mother and whose mother has such a relationship with a man not living in the house; or (c) with their mother and a man whose income is considered sufficient only for his own needs.

16. Plaintiffs PERCY allege that they and the class they represent are now suffering and will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSSM §§ 42-535 et seq., 44-133.5 in the manner set forth above, in that they will be denied benefits to which they are otherwise entitled under federal and California law at a time when they are urgently in need of such assistance. Plaintiffs PERCY have stood at all times mentioned herein, and do presently stand, ready to prove that they are without adequate resources with which to live. Plaintiffs further stood, and presently stand, ready and willing to cooperate with all reasonable and lawful requests of defendants and their agents.

17. Plaintiffs have no plain, adequate or speedy remedy at law to obtain such aid and services as they are entitled to receive, and this suit for injunction is their only means of securing such relief.

18. The enforcement of Welfare and Institutions Code, Section 11351 and the regulations implementing that section has deprived plaintiffs PERCY of benefits to which they would be otherwise entitled for the month of October, 1968, in the sum of One Hundred and Forty-Eight Dollars ($148.00), and for the month of November, 1968, in the sum of One Hundred and Forty-Eight Dollars ($148.00).

19. The continued enforcement of said provisions will deprive plaintiffs PERCY of aid and services for which they otherwise qualify in the amount of One Hundred and Forty-Eight Dollars ($148.00) monthly.

20. By reason of the continued denial by defendants and their agents, acting pursuant to said provisions, of

aid and services to plaintiffs PERCY for which they are otherwise entitled, and of which they have urgent and desperate need, said plaintiffs have been and will continue to be severely injured, in a sum not presently ascertainable. Plaintiffs ask leave to amend this complaint at a later date to state the exact amount of such damage.

FOR A SECOND CLAIM

21. Plaintiffs refer to Paragraphs 1 through 14 inclusive and Paragraph 17 and incorporate the same herein by reference as if set out at length.

22. By reason of defendants' actions, as set out more fully above, plaintiff JONES has been denied his legal rights in that:

(1) The Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602, and 606 requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) The equal protection clauses of the Constitution of the United States and the State of California prohibit the discrimination effected by defendants in imposing upon that class represented by plaintiff JONES a greater duty of support than that required of other men similarly situated but for the fact that the woman with whom they are residing has no needy children who are applicants for AFDC benefits;

(3) The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the taking of plaintiff JONES' property on the basis of a conclusive and factually inaccurate presumption.

23. Plaintiff JONES alleges that he and the class he represents will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSSM, § 42.535 et seq., in the manner set forth above, in that defendants' actions serve to deprive plaintiffs of their property by considering, as available to persons for whom plaintiffs have no legal responsibility, income which is in fact sufficient only for plaintiffs' personal expenses. Plaintiff JONES stood at all times mentioned herein, and presently stands, ready to prove that he is not able to make available to plaintiffs PERCY that

amount of income deemed available by defendants, irrespective of the contributions of shelter and food he has made for the PERCY family during their emergency.

FOR A THIRD CLAIM

24. Plaintiffs refer to Paragraphs 1 through 14 inclusive, Paragraphs 16 through 21 inclusive, and Paragraph 23 and incorporate the same herein by reference as if set out at length.

25. By reason of defendants' actions, as set out more fully above, plaintiffs JONES and PERCY have been denied those rights of privacy and repose arising under the Third, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and are unlawfully forced to surrender their constitutional rights as a condition to the eligibility for AFDC benefits of CLEA PERCY, a needy child and minor plaintiff herein.

WHEREFORE, plaintiffs respectfully pray this Court to:

1. Convene a special three-judge court as provided by Title 28, U.S.C., §§ 2281 and 2284 for hearing this claim.

2. Enter its Order that plaintiffs' action is to be maintained as a class action and direct actual notice to each member of the two classes set forth above.

3. Issue an Order temporarily restraining defendants, their successors in office, agents and employees, from denying to plaintiffs PERCY and the members of the class they represent, the aid and benefits to which they would be entitled but for the provisions of Section 11351 of the California Welfare and Institutions Code and PSSM Sections 42-535 et seq., and 44-133.5, and from enforcing said provisions against plaintiffs and the classes they represent.

Plaintiffs further respectfully pray the three judge court, when convened, to:

1. Enter a declaratory judgment declaring that Section 11351 of the Welfare and Institutions Code and the PSSM regulations promulgated thereunder, are unconstitutional on their face and as applied, and contrary to the

Social Security Act and regulations promulgated thereunder;

2. Enter a preliminary injunction, and thereafter a permanent injunction:

(a) enjoining defendants, their successors in office, agents and employees, from continuing to enforce Section 11351 and the regulations promulgated thereunder against plaintiffs and the classes they represent;

(b) directing defendants to send or instruct county welfare departments to send written notice to the last known address of all members of that class represented by plaintiffs PERCY, who applied for AFDC aid and services but were rejected, or who received aid in a reduced amount because of Section 11351 and regulations thereunder;

(c) directing defendants to award to plaintiffs PERCY and all other persons wrongfully denied AFDC assistance pursuant to Section 11351 all monies withheld from the date of their original application or attempted application.

3. Award plaintiffs costs of this suit;

4. Grant such further, other or alternative relief as may appear to the court to be just and proper.

Dated: November 12, 1968.

RUBIN TEPPER
MICHAEL H. WEISS
BRUCE A. BAILEY

By /s/ RUBIN TEPPER
RUBIN TEPPER

Attorneys for Plaintiffs
2221 Broadway
Redwood City, California 94063
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[Notarized Verification of Margaret Percy and Melvin Jones omitted in printing.]

[Exhibits A through D omitted in printing.]

Complaint of Intervenors Bell in Civ. No. 50285

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

I

Margaret Percy, Clea Percy and Melvin Jones, the original plaintiffs herein, filed their complaint on November 12, 1968, against John C. Montgomery, as Director of the State Department of Social Welfare of the State of California; the State Department of Social Welfare; H. D. Chope, as Director of the San Mateo County Department of Public Health and Welfare (DPHW); Robert D. Rippeto, as Superintendent of the Social Service Division of the San Mateo County DPHW; Anna Dobson and Ellen Harty, as employees of the Social Service Division of the San Mateo County DPHW; and the San Mateo County Department of Public Health and Welfare, State of California, defendants, seeking a declaratory judgment, sums due and owing, and preliminary and permanent injunction restraining the enforcement of and declaring unconstitutional California Welfare and Institutions Code, Section 11351, and the regulations promulgated thereunder [annexed to the original complaint as Exhibits B and C]. Plaintiffs' action is based on the fact that these statutes and regulations on their face and as applied result in the denial, reduction, or termination of Aid to Families with Dependent Children (AFDC) public assistance to needy children otherwise eligible for aid on the basis of income assumed by defendants to be available from a nonlegally responsible man residing with said needy children's mother. Plaintiffs' action is brought on the grounds that said statutes and regulations, and the actions taken pursuant thereto, deny plaintiffs their rights guaranteed by Article IV, Paragraph 2, and the Third, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 11 and 21 of the Consti-

tution of the State of California, and by Title IV of the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602 and 606, and the regulations of the United States Department of Health, Education, and Welfare (HEW) promulgated thereunder, as set forth in 33 C.F.R., Section 203.1 (annexed to the original complaint as Exhibit A).

II

On November 13, 1968, a hearing was held on plaintiffs' motion for a temporary restraining order and application for the convening of a three-judge court pursuant to Title 28, U.S.C., §§ 2281 and 2284. Plaintiffs' motion for a temporary restraining order was denied. On November 13, 1968, the Honorable Albert C. Wollenberg, District Judge, signed an order certifying to the Chief Judge of the Ninth Circuit Court of Appeals that the questions presented required the convening of a three-judge district court. Said three-judge court was convened and the matter is scheduled for hearing by said Court on November 26, 1968, at 10:00 a.m.

III

Bertha Bell, on behalf of herself and her five minor children, John, Thomas, Patricia, Rosemarie Bolden and Alberta Conrad, and Haywood Bell, on behalf of himself, intervenors, allege that:

(A) Intervenor Bertha Bell is an adult citizen of the United States. She is the mother and general guardian of her five minor children, John Bolden, age 16, Thomas Bolden, age 15, Patricia Bolden, age 14, Rosemarie Bolden, age 12, and Alberta Conrad, age 10, who are citizens of the United States and who reside with her in the City and County of San Francisco. Bertha Bell brings this action on behalf of herself and her said minor children.

(B) Intervenor Haywood Bell is an adult citizen of the United States and resides in the City and County of San Francisco, State of California. Haywood Bell brings this action on behalf of himself.

(C) Defendant Ronald H. Born (Born) is the General Manager of the San Francisco County Department of Social Services (County Department) and is responsible for the administration of the AFDC program in the City and County of San Francisco.

(D) On July 7, 1967, Bertha Bell and intervenor Haywood Bell were married. They are the parents of Cynthia Bell, a minor child.

(E) Mr. Bell has not adopted the Bolden children or Alberta Conrad and has not received them into his family.

(F) From the Bells' marriage to the present and during the time Mr. Bell has been residing with Mrs. Bell, defendants have granted, reduced, or terminated AFDC payments to the Bolden children and Alberta Conrad solely on the basis of the amount of Mr. Bell's net income. Defendants' actions have been based on California Welfare and Institutions Code, Section 11351, and public Social Services Manual (PSS), Sections 42-535, *et seq.*, and 44-133.5 (annexed to the original complaint as Exhibit C).

(G) Intervenor Bertha Bell requested a fair hearing before the State Department of Social Welfare to contest the denial and reduction of aid to the Bolden Children and Alberta Conrad. The fair hearing was completed before a state referee on May 14, 1968. To date, six months after the hearing, no decision has been rendered.

(H) During the months of April, May, June, July, August and September 1968, no AFDC payments were made for Mrs. Bell's five oldest minor children.

(I) The money from Haywood Bell's income presumed to be available to the Bolden children and Alberta Conrad was not, in fact, available except that due to the emergency situation created by the failure of defendants to provide said Bolden children and Conrad child with public assistance, Haywood Bell did provide limited food and shelter for them. In order that the burden of supporting the Bolden children and Conrad child be lifted from Haywood Bell and that said children could receive the AFDC assistance they are properly entitled to, Haywood and Bertha Bell were forced to separate and to assume separate residency in October 1968.

(J) Effective August 8, 1968, the Secretary of HEW made applicable to states receiving Federal grants-in-aid for AFDC programs revised regulations regarding stepfather and "man-in-the house" policies. Said regulations render illegal stepfather and man-in-the house budgetary rules which impute income to recipients of, or applicants for, AFDC benefits unless that income is available, *in fact*, except where a state law of general applicability imposes a legal duty to support those needy children upon the stepfather or man-in-the house.

(K) California Civil Code, § 209, provides that a husband is not bound to maintain his wife's children by a former husband.

(L) On or about August 28, 1968, Mrs. Bell reapplied to the San Francisco County Department for AFDC payments for the Bolden children and Alberta Conrad. Mrs. Bell submitted a declaration from Mr. Bell [attached hereto as Exhibit A and incorporated herein as if set forth in full] and the regulations of the United States Department of Health, Education, and Welfare regarding state welfare stepfather policies. 33 C.F.R., Section 203.1 (annexed to the original complain as Exhibit A). This application was denied on the basis of Mr. Bell's defendants' assumption that Mr. Bell's net income was available to support said children.

(M) On October 3, 1968, Mr. Bell lost his job and he and Mrs. Bell applied for public assistance for the family. They were given a food order of $104 and $240 grant for October.

(N) A week later Mr. Bell found a new job and the family again faced the prospect of losing its public assistance grant by reason of defendants' assumption that Mr. Bell's earnings from this job would be income available to Mrs. Bell and her oldest five minor children.

(O) On October 16, 1968, Mr. Bell left his wife's residence and has since that date lived with his mother. He has agreed to send Mrs. Bell $50 per month for the support of his child Cynthia Bell.

(P) By reason of Mr. Bell's departure from the home, the four Bolden children and Alberta Conrad are now receiving AFDC benefits but at the severe cost of losing

the only adult male figure in the household. This deprivation has caused and will continue to cause severe psychological and emotion on these minor children, especially on the two eldest sons of Mrs. Bell, John Bolden, age 16, and Thomas Bolden, age 15.

(Q) By defendants' denial of aid and services to intervenor Bolden children and Alberta Conrad from April through September 1968, to which they were otherwise entitled, said intervenors have been severely injured, in a sum not presently ascertainable. Intervenors ask leave to amend this complaint at a later date to state the exact amount of such damage.

(R) By reason of defendants' actions, as set out more fully above, intervenor Haywood Bell has been denied his legal rights in that:

(1) the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602, and 606, requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) the equal protection clauses of the Constitution of the United States and the State of California prohibit the discrimination effected by defendants in imposing upon intervenor Haywood Bell a greater duty of support when he is residing with his wife than required of other men similarly situated but for the fact that the women with whom they are residing have no needy children who are applicants for AFDC benefits; and

(3) the due process clause of the Fourteenth Amendment to the United States Constitution prohibits the taking of intervenor Haywood Bell's property on the basis of a conclusive and factually inaccurate presumption.

(S) Intervenor Haywood Bell alleges that he will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSS, §§ 42.535, *et seq.*, in the manner set forth above, in that defendants' actions serve to deprive plaintiffs of their property by considering, as available to persons for whom Mr. Bell has no legal responsibility, income which

is, in fact, sufficient only for the need of himself, Mrs. Bell and Cynthia Bell. Intervenor Haywood Bell stood at all times mentioned herein, and presently stands, ready to prove that he is not able to make available to intervenor Bolden children and Alberta Conrad that amount of income deemed available by defendants.

(T) By reason of defendants' actions, as set out more fully above, intervenors Bertha and Haywood Bell have been denied those rights of privacy and respose arising under the Third, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and are unlawfully forced to surrender their constitutional rights as a condition to the eligibility for AFDC benefits of the Bolden children and Alberta Conrad.

IV

Intervenors herein have no adequate remedy at law and unless defendants are enjoined by this Court, they will continue to suffer irreparable injury.

WHEREFORE, Bertha and Haywood Bell, John, Thomas, Patricia, and Rosemarie Bolden, and Alberta Conrad, intervenors herein, respectfully pray that answers be filed by defendants and pray that this Court:

(1) assume jurisdiction of this cause and convene a three-judge district court;

(2) enter a declaratory judgment pursuant to Title 28, U.S.C., §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring Section 11351 and the regulations promulgated thereunder violate:

(a) the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, in that they authorize and require the denial, reduction or discontinuance of AFDC public assistance to needy and eligible children on the basis of income assumed to be available from a not legally responsible man living with or married to said children's mother;

(b) the Fourteenth Amendment to the United States Constitution in that they deny Haywood Bell his property without due process of law; and

(c) Article IV, paragraph 2, and the Third, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution in that they deny Mr. and Mrs. Haywood Bell their constitutional rights to privacy and repose;

(3) enter a preliminary and permanent injunction restraining defendants, their agents, servants and employees, from enforcing California Welfare and Institutions Code, § 11351, and the State Department of Social Welfare regulations promulgated thereunder so that no child will be denied AFDC or have AFDC benefits reduced or terminated on the basis of income assumed to be available from a not legally responsible stepfather or Man Assuming the Role of Spouse (MARS); and

(4) allow intervenors their costs herein and grant them such additional or alternative relief as the Court may deem to be just and appropriate.

Dated: November 22, 1968.

/s/ STEVEN J. ANTLER
STEVEN J. ANTLER

[Notarized Verifications of Bertha Bell and Haywood Bell omitted in printing.]

EXHIBIT A (to Intervenors' Complaint)

DECLARATION

I, HAYWOOD BELL, say and declare that:

1. I married Bertha Bell on July 7, 1967. We are now residing together at 38 Gilroy Street, City and County of San Francisto.

2. My immediate family consists of myself, my wife and our child, Cynthia Bell, age 9. I am presently employed and am willing and able to support this family.

3. My wife has five other children: John Bolden, born January 26, 1952; Thomas Bolden, born January 19, 1953; Alberta Conrad, born January 10, 1958; Patricia Bolden, born March 22, 1955; and Rosemarie Bolden, born April 13, 1956.

4. I have never voluntarily supported my wife's other children and I do not intend to be responsible for their support. At the time I married Mrs. Bell, she was receiving AFDC and I married her with the understanding that public assistance would continue for her other children. Immediately following our marriage, AFDC payments did continue.

5. In March, 1968, the San Francisco Department of Social Services began to reduce the AFDC payments to my wife's children on the assumption that my earnings were available to support these children. This assumption was false and I sought legal advice and requested an administrative fair hearing to contest the welfare department's action.

6. Effective May 31, 1968, all AFDC payments were terminated. Because of the dire situation created by the cutoff of funds for the other five children, I have had to incur personal debts and not meet my own obligations (i.e., rent payments, union dues, car insurance, life insurance) to see that the other five children did not starve. The money I have spent on their behalf was only spent because of the emergency situation which resulted from the Welfare Department's action. I have not voluntarily supported these children, and I have not and do not now assume, in any way, the role of parent to any of them

or receive them into my family. I demand that all funds expended in their behalf be returned. I expect this result from the decision to be rendered in the pending fair hearing.

7. My wife is about to re-apply for an AFDC allowance for her five children to whom I am not related. I intend to and will terminate all payments for food and other necessities which I am now forced to provide as soon as a final decision has been made on her application.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed at San Francisco, California, this 21st day of August, 1968.

/s/ HAYWOOD BELL
HAYWOOD BELL

Motion to Dismiss Complaint and to Dissolve Three Judge Court and Return to Motion for Preliminary Injunction in Civ. Nos. 50238 and 50285

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

Defendants move this Court to dissolve the three-judge court which was convened pursuant to Title 28, United States Code, Sections 2281, 2284, for the reason that the three-judge court lacks jurisdiction because the complaint raises no substantial federal questions.

Defendants also move this Court, either as a three-judge court if the preceding motion is denied, or as a single-judge court following the dissolving of the three-judge court, to dismiss the complaint without leave to amend for the reason that the complaint fails to state a claim upon which relief can be granted.

In the alternative, defendants respectfully urge this Court to deny plaintiffs' motion for preliminary injunction for the following reasons:

1. The status quo should, and will, be preserved pending a final decision in this matter by a denial of the motion for preliminary injunction;
2. Plaintiffs have failed to establish such irreparable injury which, when compared with the countervailing irreparable damange to the public, can justify the granting of a preliminary injunction;
3. Plaintiffs have not shown the requisite probability of success on the merits of their cause of action.

If a preliminary injunction issues out of this Court, defendants request and urge that a good and sufficient security bond be required of plaintiffs to secure defendants if they subsequently prevail on the merits.

Attached hereto and made a part of this proceeding is a copy of the memorandum of points and authorities

filed in *Percy, et al.* v. *Montgomery, et al.*, Civil No. 50285, in this Court.

DATED: November 22, 1968.

THOMAS C. LYNCH
Attorney General of the
State of California

ELIZABETH PALMER
Deputy Attorney General

JAY S. LINDERMAN
Deputy Attorney General

RICHARD J. MOORE
County Counsel
County of Alameda

BEN H. ZUPPAN
Deputy County Counsel
County of Alameda

KEITH C. SORENSON
District Attorney
San Mateo County

JEROME F. COLEMAN
Deputy District Attorney
Attorneys for Defendants

[Memorandum of Points and Authorities and Certificate of Service omitted in printing.]

Memorandum Opinion (Original Filed Dec. 23, 1968, Clerk, U.S. Dist. Court, San Francisco)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 50238

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, PLAINTIFF

vs.

PAULINE STARK, ET AL., DEFENDANTS

Case No. 50285

MARGARET PERCY and MELVIN JONES, ET AL., PLAINTIFFS

vs.

JOHN MONTGOMERY, ET AL., DEFENDANTS

BEFORE: HAMLIN, U. S. Circuit Judge, and ZIRPOLI and WOLLENBERG, U. S. District Judges

MEMORANDUM OPINION

Plaintiffs seek in their own behalf and as representatives of their respective classes to have this court declare that section 11351 of the California Welfare and Institutions Code, and the related sections of the California Public Social Services Manual (PSSM), are contrary to federal regulations interpreting the Social Security Act and are unconstitutional.

The original plaintiffs in this action were Genever Lewis (Civ. No. 50238) and Margaret Percy (Civ. No. 50285). These plaintiffs sued on behalf of themselves, their children, a man assuming the role of spouse (MARS) in the Percy home, and all other individuals similarly situated. Motions to intervene were made prior to the date set for consolidated hearing, and those motions

brought before this court two families with a stepfather instead of a MARS, as well as a third family with a MARS. By virtue of the circumstances of the original plaintiffs and the intervenors, leave to intervene would appear mandatory, Fed.R.Civ.Proc. 24(a). Any findings of this court contrary to the interests of the MARS would apply a fortiori to the stepfather. For this reason the motions to intervene in No. 50285 are granted to Virginia Sims, Mary J. Garner, Bertha Bell and their minor children, and to Humberto Garcia and his minor child, and Haywood Bell. For this reason also this court will refer only to the claims raised by the MARS and will not treat separately the claims of the stepfather, as we deem it unnecessary to do so.

I

Introduction

The federal government maintains in cooperation with the states, a program of assistance to families with dependent children (AFDC). According to one provision of the controlling federal statute, the Social Security Act, "A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, as well as any expenses reasonably attributable to such income . . . ." 42 U.S.C. 602 (a)(7). The federal government and the state of California are in disagreement as to the proper method of taking "into consideration any other income and resources of any child" when there is present in the family a "man assuming the role of spouse." Regulations issued by the Department of Health, Education and Welfare in August, 1968 permit a state to take into account contributions from a MARS only if there is "proof of actual contributions".[1]

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[1] 45 C.F.R. § 203.1:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act to be approved under section 402 of such Act (42 U.S.C. 602), must

California proceeds differently. It obligates a MARS to support the children in the home if he is able. "/A/n adult male person assuming the role of spouse . . . . *is bound to support*, if able to do so, his wife's children if without support from such . . . adult male person they would be needy children eligible for aid under this chapter." Cal. Welf. & Inst. Code § 11351 (emphasis added).[2]

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provide that the determination whether a child had been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2 (i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of *proof of actual contributions*. (Emphasis added).

[2] Section 11351 reads in full as follows:

"Where a needy child lives with his mother and a step-father or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such step-

The MARS ability is determined by the state according to established categories of allowable income and deductions. Under California's statute and regulations, the amount of assistance to the needy family is reduced by the amount of income which the state has computed to be available from the MARS.[3] Under the HEW regulations,

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father or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, 'adult male person' means any male person of age 18 years or older."

[3] The statute is set forth in note 2, *supra*. The following regulations are contained in the Public Social Services Manual:

42-535 Responsibility of man assuming the role of spouse.

AFDC .1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.2 *Responsibility of Man Assuming Role of Spouse for Support*

The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

* * * *

44.133 Treatment of Income (Continued)

AFDC .5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

[Footnote continued on page 38]

the amount of assistance may be reduced only by the amount of proved contributions. Thus the situation can arise in California where the state will regard the family to be living on money which the MARS is actually spending for purposes not recognized by the allowable deductions (living expenses, job-related expenses, court-ordered

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* [Continued]

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all the children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the AFDC assistance standard for the family consisting of the members of the FBU, the unmarried father or man asuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, here is no income to the FBU. His children are needy and may qualify for AFDC as a separate case if his income is less than the need.

child support payments and medical care). Therefore, despite the presence in the home of a MARS earning sufficient income to support the family, the family may still be in actual need. Under the HEW regulations the family is considered needy; under California law it is not.

Plaintiffs representing mothers, children, stepfathers, and MARS in families whose assistance has been modified under California's statute and regulations cite the HEW regulation, and the equal protection clause, the due process clause, and the right to privacy as bases for overturning the California practice to which they object. Plaintiffs seek a temporary order restraining the enforcement of the California budgetary rules, and declaratory and injunctive relief. This three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, and jurisdiction rests on 42 U.S.C. § 1983. Defendants have moved to dissolve the three-judge court for lack of a substantial federal question and to dismiss the complaint without leave to amend for failure to state a claim.

II

HEW Regulations

Plaintiffs contend that the HEW regulations must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

The HEW regulations, however, bar from state consideration resources controlled by a MARS. It is just these resources that California takes into account under Welf. & Inst. Code § 11351. The statute obligates the MARS to support the children in the home to the extent he is

able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression mandate, are, in the view of this court, invalid. They exceed the Secretary's authority to make "rules and regulations not inconsistent with" the Social Security Act, 42 U.S.C. § 1302. The Secretary has, of course, the "power to fill up the details" *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77, 85 (1932), but he is nevertheless "required to follow Congressional mandate, whether explicit or ascertainable in underlying policy." *United Steel Workers of America* v. *N.L.R.B.*, 390 F.2d 846, 851 (1968). The Supreme Court recently articulated the underlying policy by saying "that Congress expected 'breadwinners' who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was *legally obligated* to support his children." *King* v. *Smith*, 392 U.S. at 329, (emphasis added). The HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope. California, on the other hand, shares the congressional expectation. By creating a rule out of harmony with the enabling statute, HEW has created a mere nullity. *Manhattan General Equipment Co.* v. *C.I.R.*, 297 U.S. 129, 134 (1936). California, therefore, is not in conflict with any valid federal law.

In addition to upholding the California practice for the reason that the HEW regulation violates the policy of the Social Security Act, this court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the "AFDC program is based upon a scheme of cooperative federalism." *King v. Smith*, 392 U.S. at 316. Under this scheme, the states have the sole responsibility for determining the standard of economic security. Moreover, the legislative history of the Act makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n.14. As one Representative said during the floor debates, "need is to be determined under the State law." *Id.* at 319 n.14. California has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from; (a) statutorily imposing an obligation of support on the MARS to the extent of his ability; (b) determining that to this extent the child is not needy; and (c) reducing the child's assistance accordingly. As the Supreme Court has pointed out, this authority was intended for the states prior to the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward without change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)

III

Equal Protection

Plaintiffs claim that the challenged provisions of California's welfare program deny equal protection to two classes: (1) needy children who reside with a MARS, and (2) the MARS himself. The thrust of plaintiffs' objection is that the classifications drawn by the legislature are not reasonably related to the purposes of the statute, and that it is unconstitutional to impose on the children and the income-earning MARS in a family receiving AFDC payments a burden that is not imposed on AFDC children without an income-earning MARS or on a MARS living with a nonAFDC family.

In resolving conflicts turning on equal protection, this court is guided by the content given to the equal protection clause by the United States Supreme Court. In *Morey* v. *Doud*, 354 U.S. 457, 463-64 (1957), the Court offered four rules for testing discrimination in social legislation. First, the equal protection clause does not deprive the states of a "wide scope of discretion", and a statute having a reasonable basis will be upheld. Second, a failure of "mathematical nicety" or the creation of "some inequality" is not offensive to the equal protection clause. Third, a classification will be sustained "if any state of facts reasonably can be conceived that would sustain it." Fourth, the burden is on the attacker to show no reasonable basis. This test has been applied to strike down a state statute excepting a named company from state regulation, *Morey* v. *Doud*, *supra;* to strike down a state rule prohibiting illegitimate children from bringing a wrongful death or survival action for the death of their mother, *Levy* v. *Louisiana*, 391 U.S. 68 (1968); and to strike down a state rule selectively prohibiting the mother of an illegitimate child from recovering for injury or death to the child in some circumstances but not in others, *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). The Supreme Court could find no possible rational basis for these legislative classifications.

Turning to the contentions raised by plaintiffs in the present case, this court first finds that there is no discrimination of any sort in regard to the AFDC children. Plaintiffs complain that the mere presence of the MARS puts the children in an "inferior status", and seek vindication by making an analogy to the *King* case. Plaintiffs' line of argument is erroneous for the reason that the modification of assistance takes place equally for all AFDC children if they have other resources available to them. Children in a MARS family are not discriminated against. They receive equal treatment with all other children receiving AFDC assistance.

Plaintiffs' analogy to the *King* case and characterization of the California practice as a subtle version of Alabama's statute are highly inaccurate. In *King*, the

man found by Alabama to be a substitute father lived with his own family and made no income or resources available to the supposed "substitute" child and its mother and clearly had no ability to contribute to their support. Worse, the Alabama regulation made deprived children ineligible for aid due solely to the sexual conduct of their parent. Thus, the *King* case raised "only the question whether the State may deal with these problems [of immoral conduct and illegitimacy] in the manner it has here—by flatly denying the AFDC assistance to otherwise eligible dependent children." 392 U.S. at 320.

This case is quite different. Here we have a California statute and regulations which deal with a man who actually is "in or around the home" and either assumes financial responsibility or represents himself to the community as the husband or father, not one who, as in *King*, had an occasional rendezvous with the mother. More importantly, California does not disqualify otherwise eligible needy families for aid because of the mother's sexual behavior; it simply considers the man's income in computing the welfare grant. It provides for a reduction of payments to the extent the man has *actual* ability to support.[4] The state of California does not reduce welfare grants because of the frequency of sexual relations or the presence of illegitimate children, but because of the actual presence of a breadwinner in the home of the applicant or recipient of aid. That breadwinner must, if able to do so, support his "adopted" child.[5]

Thus, California, unlike Alabama, does not deny or modify AFDC grants to "destitute children who are legally fatherless . . . on the transparent fiction that they have a substitute father." 392 U.S. at 334. California determines whether a legally fatherless child is destitute before granting, limiting or denying aid, and that determination includes the 'reasonable' inquiry whether the child has a MARS to look to for support which the state obligates him to provide.

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[4] See note 3 *supra*.

[5] See note 2 *supra*.

This court can easily conceive of rational purposes that justify the modification of assistance in light of a MARS' net income. To the extent that the number of beneficiaries and the amount of their assistance can be reduced according to their administratively determined need, it may be possible to increase the amount of assistance to other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations. Also, it is certainly permissible for any program of government spending to minimize expense where possible, and the net income of a MARS living with recipient children is a rational incident for such expense minimization.[6]

It is not invidious for the legislature to eliminate the financial bonus that would, in the absence of California budgetary rules, accrue to unmarried couples receiving AFDC benefits. In the absence of the obligation imposed by Welf. & Inst. Code § 11351, a MARS could engage in all aspects of family life while shifting the expense of supporting the children in the home from himself to the state. By imposing the support obligation on the able MARS, the state was justifiably eliminating this evasionary device.

Moreover, in cases where the AFDC child's natural father has established a new family, the legislature was making the socially advantageous choice of permitting the natural father to devote his resources to his new family so long as the MARS is able to provide support for the AFDC family.

In this context, the court is unable to say that California acts toward AFDC recipients in a MARS family in a way that is invidiously discriminatory. *Levy* v. *Louisiana*, *supra*. The plaintiffs have failed to discharge their burden of showing that the California budgetary rules have no reasonable basis. We therefore find that the program for assistance modification does not deny AFDC children equal protection of the laws.

Plaintiffs' second argument that the MARS is denied equal protection is likewise without merit. Plaintiffs

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[6] *See* Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 775-76 (1966).

contend that, because the support obligation of a MARS exists only for children receiving AFDC assistance, the MARS in a welfare family is treated differently from a MARS in a non-welfare family. This contention is of course true, but it is also irrelevant. The obligation imposed on the MARS in an AFDC family is part of a comprehensive pattern of child-support statutes directed variously at natural parents, Cal. Civ. Code §§ 137, 137.1, 137.2, 139, 143, 196, 196a, 199, 230, and Cal. Pen. Code § 270; adoptive parents, Cal. Civ. Code § 228; and stepfathers and men assuming the role of spouse, Welf. & Inst. Code § 11351. These obligations differ according to need and to the nature of the "parental" relationship. To be sure, a MARS in a non-AFDC family is free of support obligation. But this court cannot say that the "discrimination" against the MARS in the AFDC family results from a distinction that has no relevance to the purpose for which the classification was made. *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). It is not invidious for the legislature to recognize that in a society of many cultures and many impoverished individuals, perfectly stable, though informal, families will inevitably arise.[7]

This court is not unaware that the state's policy may induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the MARS. Men who respond to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence. Nevertheless, this court cannot say that the California legislature has been wholly arbitrary in incurring this risk. As some commentators have observed, the only employable males likely to be thus influenced to forsake their "families" would be "(1) those who would rather use their own income on themselves to the exclusion of their families, and (2) those who would be tempted to desert their fami-

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[7] tenBroek, *California's Dual System of Family Law (III)*, 17 Stan.L.Rev.614, 617-19 (1965).

lies simply because the taxpayers' contribution to the family's income is eliminated." [8] This court cannot say that California has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners. To be sure, "any policy is likely to produce some undesirable side effects",[9] but we believe that these consequences are within the boundaries of the equal protection clause. Plaintiffs' second objection, therefore, must fail.

IV

Due Process

Earlier in this opinion, we mentioned the possibility that California will regard a family seeking AFDC assistance as living on money deemed available from the MARS even though actually put to other uses. This situation arises where the MARS makes expenditures that are not covered by the state-allowed deductions for living expenses, job-related expenses, court-ordered child support payments, and medical care. Money spent for other, non-deductible, purposes is deemed by the state to be net income available to the family. Under Welf. & Inst. Code § 11351, such net income is required to be applied to the needs of the family. To the extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the reduction though the MARS fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis

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[8] Lewis & Levy, *supra*, note 6, at 779-80.

[9] *Id.* at 776.

of those nonexistent facts. Yet closer analysis entirely dispels the persuasiveness of plaintiffs' claim.

First, we repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. Welf. & Inst. Code § 11351. We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made.[10]

Second, we conclude that even if the available deductions have been too narrowly drawn to suit the preferences or style of life of some MARS, the effort to enlarge these categories must be directed to the legislature, not the courts. The days are over when the due process clause may be used to strike down state laws thought "unwise, improvident, or out of harmony with a particular school of thought". *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). We admit that the assumption of available resources will accurately reflect the facts for one particular family but not for another. Similarly, however, the restriction of certain optical practices to licensed ophthalmologists or optometrists will accurately reflect the ability of one particular unlicensed person but not of another. *Williamson, supra.* Again, permitting only practicing lawyers in the state to engage in "debt adjusting" may accurately reflect the abuse that would otherwise be imposed on distressed debtors by one particular nonlawyer, but not by another. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). In light of these Supreme Court decisions upholding irreversible determinations as to the undesirability of allowing unlicensed persons and nonlawyers to engage in certain activities, this court

[10] tenBroek, *supra*, note 7, at 657.

must uphold over due process objections, California's irreversible determination that a MARS' net income, as computed by the state, is available to AFDC recipients.

V

Right of Privacy

Plaintiffs' final contention is that enforcement of the state's budgetary rules violates a MARS' right of privacy. We agree that the state's program may intrude into the private life of the MARS to determine whether he is maintaining an intimate relationship with the mother and to ascertain his financial status. We also agree that the "notions of privacy surrounding the marriage relationship" protect that relationship from certain intrusions. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Nevertheless, plaintiffs have failed to demonstrate that the practices of the state would be shown at trial to resemble the methods necessary to prove use of contraceptives, which methods were firmly rejected as "repulsive" by the Supreme Court. Proof of an intimate relationship, as required by the California regulations, is a far different matter, and does not require nearly so extensive or detailed an inquiry into the practices of the man and woman. California's regulations therefore fall without the "zone of privacy" recognized in *Griswold* and are not unconstitutional. What we have just said about the inquiry into "intimate relationship" applies a fortiori to the inquiry into the MARS' finances, an inquiry little different from that required for the enforcement of federal and state taxation. This fourth contention of plaintiffs must therefore fail.

VI

California's budgetary rules obligate a man assuming the role of spouse to contribute his income, to the extent that he is able, to an otherwise needy AFDC family. To the extent of the MARS' administratively determined ability, the grant to the AFDC family is reduced. Although this practice conflicts with a recent HEW regu-

lation requiring proof of actual contributions, we sustain it because we find the HEW regulation to be inconsistent with the language and policy of the Social Security Act, an unfounded intrusion into a province reserved by the Act and its legislative history for the states, and therefore invalid. We further find that California's practice is not prohibited by the equal protection or due process clauses of the constitution, or by the right to privacy announced in *Griswold* v. *Connecticut*. We therefore find that plaintiffs have not, under color of any state statute, been deprived of any rights secured by the constitution, and that this complaint seeking relief under 42 U.S.C. § 1983 must be dismissed for failure to state a claim upon which relief can be granted. The motions to intervene having been granted, this dismissal is effective as to both the original plaintiffs and the subsequent intervenors.

The dismissal of the complaint renders unnecessary consideration of any of plaintiffs' motions for relief.

In view of the disposition of plaintiffs' claims, this three-judge court is hereby dissolved.

Dated: December 19, 1968.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

Motion to Vacate Memorandum Order Dismissing Complaint and Dissolving Three Judge Court and Motion for Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

TO: OLIVER J. HAMLIN, U.S. Circuit Judge
ALFONSO J. ZIRPOLI, ALBERT C. WOLLENBERG, U.S. District Judges

Plaintiffs hereby move this Court to vacate its Memorandum Order filed on December 23, 1968. Plaintiffs further move for an order resetting this cause for argument and trial with proper notice to all parties and to the United States Department of Health, Education, and Welfare (HEW).

This motion is based upon the papers of all parties previously filed herein and upon the exhibits attached hereto. Plaintiffs submit this motion to the Court for decision by the Court ten (10) days after service upon attorneys for defendants without oral argument unless the Court deems such argument necessary and sets the motion for hearing.

Plaintiffs respectfully call the Court's attention to footnote 16 in *King* v. *Smith*, 88 S. Ct. 2128, 2134 (1968), which reads as follows:

> "Indeed, the Act requires that in determining need the state agency 'shall * * * take into consideration any other income and resources of any child or relative claiming aid to families with dependent children * * *.' 42 U.S.C. § 602(a) (7). Regulations of HEW, *which clearly comport with the statute*, restrict the resources which are to be taken into account under § 602 to those 'that are, in fact, available to an applicant or recipient for current use on a regular basis. * * *' This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual." (Emphasis added.)

Plaintiffs urge that this Court reconsider its decision as its determination is directly contrary to the position

of the Supreme Court as expressed in the quoted footnote.

Plaintiffs further urge that the Court consider the letter dated December 13, 1968, from Alanson W. Wilcox, General Counsel, HEW (attached hereto as Exhibit B), which provides a full explanation of federal policies regarding treatment of "income and resources" of Aid to Families with Dependent Children (AFDC) recipients. The letter was not available to the Court at the time of its decision, as it was not received from HEW until December 20, 1968, one day after the Court rendered its decision.

Plaintiffs also attach hereto as Exhibit A a copy of a memorandum submitted by the Attorney General on behalf of defendant John C. Montgomery (Montgomery) in the case of *McPherson* v. *Montgomery*, Civ. Act. No. 46759 (N.D. Cal., June 24, 1967), as well as the Order of the Court dismissing plaintiff's complaint therein. In *McPherson* the Court was told by defendant Montgomery's attorney that:

> "The basic thrust of the complaint in the instant matter is with respect to regulations of the Department of Social Welfare which permit the Department and its agents (the county welfare departments) to treat income as available to an applicant for aid and her dependents even when that income is not in fact available. The reasonableness of plaintiffs' complaint on this issue has been recognized by both the U.S. Department of Health, Education, and Welfare and the State Department of Social Welfare."

Based on defendant Montgomery's acceptance of the requirement that income and resources must be actually available, the Court rendered its decision.

For the reasons stated above, plaintiffs' motions should be granted.

Dated: January 2, 1969.

Respectfully submitted,

/s/ STEVEN J. ANTLER
STEVEN J. ANTLER

[Exhibit A omitted in printing.]

EXHIBIT B (to Motion to Vacate, etc.)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

[SEAL]

Office of the
General Counsel

Dec 13, 1968

Mr. Thomas K. Gilhool
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Dear Mr. Gilhool:

This is in reply to your inquiry concerning our interpretation of the amendment to section 402(a)(7) which was made by the Social Security Amendments of 1967. More specifically you state that various questions have arisen in connection with proceedings concerning State substitute father and stepfather provisions, and you request clarification of our policy with regard to the amended income and resources provision of the statute, and its relationship to this Department's regulations on "Deprivation of Parental Support or Care", 45 CFR Part 203 (33 Fed. Reg. 11290, August 8, 1968) and on "Need-Requirements for State Public Assistance Plans." Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968). Perhaps the clearest and most orderly way to answer your questions is to detail the development of these provisions in chronological order.

The basic issue here revolves around what is known as the "essential person" policy. It has been the long-standing policy of this Department (and its various forerunners) to permit States to include, in computing the needs of a person eligible for any of the categories of financial assistance, the needs of another person (or persons) living in the same home whose presence is essential to the well-being of the recipient. Such an essential person

is not a "recipient"; to gain that status he must be eligible in his own right. Rather, the theory is that part of the recipient's need is to have the essential person present in the home, and thus the financial cost of achieving this result can be considered as part of the recipient's need.

The common sense of this policy becomes apparent upon citing a few examples.

In order to be eligible for old-age assistance, an individual must be 65 years of age or older. Consider a 65 year old man, whose wife is only 62. There can be no doubt that the continued presence of his wife is essential to the recipient's well-being, and thus the States are permitted to include her subsistence needs in computing the recipient's budget.[1]

Similarly, assume the case of a child and his mother. If there is another child in the family who is older than the State's limit for the eligibility of dependent children, he cannot qualify as a recipient. However, a State may consider that the continued presence of siblings in the home is essential to the well-being of the younger child and serves to strengthen family life, and thus may include their needs in the family budget. These siblings are not recipients, but their needs are met.

As the other side of the coin, when the needs of an essential person are included in the family's budget, the Federal agency has alway required that all income and resources of that person must also be considered as part of the family assets in determining their total need, in

[1] Several of the formulas under the Social Security Act for computing the amount of Federal funds payable to the States are set forth in terms of the number of recipients and the total amount of payments under the State plan. In our example, there would be only one recipient (the husband); but the total payment under the State plan to meet his needs and those of his wife would be counted. The essential person concept was thus accommodated to the provisions of the Social Security Act, although prior to the 1967 Amendments the Act did not contain any direct reference to the essential person.

the same way that all income and resources of a recipient are considered, in accordance with the requirements of the Act.

The State has the option of recognizing essential persons, and if it does so, must describe in its State plan the classes of persons who will be so included (such as spouses, siblings, etc.). Unrelated individuals living in the home may be included as essential persons. However, the choice must be left to the applicant or recipient as to whether a nonrecipient living in the home will, in that individual case, be included as an essential person. If an older brother is living in the home and has a certain amount of earned income which he spends on himself, the family may not want him included because inclusion of his income would mean that all his income would be deducted from the family's budgeted needs even though not actually available to the rest of the family. Of course, even if he is not included as an essential person, all amounts which he actually contributes to the family must be considered by the State agency as part of the child's or caretaker relative's income and resources.

Thus, prior to the Social Security Amendments of 1967, the Federal policy setting forth the requirements for State plans provided as follows:

> "If a State chooses to establish the need of an individual on a basis that recognizes as essential to him the presence in the home of other needy persons, the plan must include the State's policy as to the persons whose need will be comprehended in the individual's need. The State's instructions must set forth clearly that the decision as to whether any persons within the State's definition are essential to his well-being shall rest with the recipient." Handbook of Public Assistance Administration Part IV-3131, item 4.

Congress in considering the 1967 amendments to the Social Security Act, was fully aware of this essential person policy (as will be indicated below). However, they preferred to have this policy made express in the statute.

There were several reasons for this decision. For one thing, some States make sizeable expenditures in connection with the needs of the essential person and it would seem appropriate for this reason alone to establish an express statutory base. Also, it was necessary to make reference to the essential person in order to achieve certain other results, including, under AFDC, the exemption of earned income (§ 402(a)(8)), the provision of services (§ 402(a)(14)) and where appropriate, the development of a plan for employment and referral to the Work Incentive Program (§ 402(a)(15), (19)) and, in general, to integrate the essential person more fully into all aspects of the public assistance program.

Section 402(a)(7), prior to the 1967 amendments, required that the State agency take into consideration the income and resources of any child or relative claiming aid to dependent child (subject to a few specific exceptions which are not relevant here). The language of this provision was amended so that it now reads, in pertinent part:

> "§ 402(a). A State plan . . . must . . . (7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid . . .*" (Amendment underscored.)

Therefore, the statute now explicitly requires that the income and resources of the essential person, that is, the individual whose needs are included in the family budget, must be considered as available to the family in the same fashion as income and resources of a child or relative claiming aid to families with dependent children.

The Report of the Committee on Ways and Means, where this amendment originated, describes the new provision and states that it "makes no change in present law."

H.R. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967). Thus, it seems perfectly clear that Congress was fully aware of the "essential person" policy, had no intention of changing it, and was merely making express provision for an administrative interpretation of longstanding. We therefore consider all aspects of our policy in this area as unchanged by the amendment and fully applicable to all States. In this light, the reference in section 402 (a) (7), as amended, to "any other individual . . . whose needs the State determines should be considered" relates to the State's option of recognizing essential persons or not, and of designating the classes of persons who will be so recognized. It does not change the prior-existing Federal rule that the applicant or recipient has the choice as to whether any particular individual will be recognized as an essential person.[2]

The clear intent of the statute is reflected in the implementing Federal regulations, which set forth the essential person policy without substantive change, as follows:

> "A State plan . . . must . . .
>
> "6. If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals,

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[2] There has been some confusion about the unchanged provision in section 402(a) (7) whereby the State must "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." This refers to the individuals who are considered recipients in the particular case, as contrasted with essential persons. Moreover, claiming aid is voluntary with the claimant. The definition of "relative with whom any dependent child is living" under section 406 indicates which relatives, including stepparents, may be considered as recipients of AFDC for purposes of Federal financial participation. In any particular case, however, which relative is considered to be a recipient depend on the child's circumstances, and who claims aid. In the ordinary case involving a stepparent, only the children and the mother are considered to be recipients, i.e., "claiming aid"—in most situations, only one relative may be counted as a recipient—and the stepfather is inlcuded, if at all, as an essential person.

(i) Specify the persons whose needs will be included in the individual's need, and

(ii) Provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient." Regulations on "Need—Requirements for State Public Assistance Plans," item 3.B.6, Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968).

These regulations were announced, with binding effect on the States, on May 24, 1968, prior to the decision of the U. S. Supreme Court in *King* v. *Smith.*

The regulations also provide that, in the consideration of income and resources, only such net income as is actually available for current use on a regular basis will be considered, but that income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21. Items 3.C.2 (i) and (iii) and 3.C.6(ii) (33 F.R. 10230, July 17, 1968). With respect to children, therefore, income of a relative other than a "parent" could not be assumed, but would be considered only if actually used for the children.

Prior to the decision of the U. S. Supreme Court in *King* v. *Smith,* the regulations were applied in the light of State "substitute father" rules. Some States with such rules made children totally ineligible because of a stepfather or other substitute father, while other States with such rules assumed the income of the substitute father and allowed the family to be eligible for needs beyond that income. Such assumption of income was tolerated by the Federal agency, even though otherwise contrary to the Federal regulations, only because it was viewed as the application of a substitute father rule, albeit one which did not automatically make the family completely ineligible for AFDC.

When the decision in *King* invalidated State substitute father rules, there was no basis for the Federal agency to apply its regulations relating to non-assumption of income in any way other than as written. It should be particularly noted that the Supreme Court was mindful

of these regulations and stated that they "clearly comport with the statute." 88 S. Ct. 2128, 2134, n. 16 (1968).

We look, then, to the Department's regulation on "Deprivation of Parental Support or Care." 33 F.R. 11290 (Aug. 8, 1968). Section 203.1(a) provides that the determination pertaining to deprivation of parental support or care may only be made with respect to a child's natural or adoptive parents, or with respect to a stepparent only where he is "legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." Subsection (b) then specifically provides that the inclusion in the family or presence in the home of a person other than those described in subsection (a) "is not an acceptable basis . . . for assuming the availability of income by the State" and "the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions."

Thus, a State may not automatically assume that any or all of the income (or any other resources) of a stepparent (other than one with support obligations as set forth in the regulation) or other "substitute parent" is available to the family; only actual contributions which he makes may be considered. However, the State may classify stepfathers or other related or unrelated individuals living in the home as essential persons under its plan, subject

---

[3] This limitation on stepparents, with respect to whom the State may determine deprivation of parental support or care, is required by the court's decision in *King* v. *Smith*. The court specifically concluded that "parent", as that term is used in title IV of the Social Security Act, includes only persons with a State-imposed legal duty to support the child for whom assistance is sought. The reasoning of the opinion clearly supports the further restriction that the State law imposing the same obligation as is borne by the natural parents. To permit a special lesser duty to be established for stepfathers or other substitute fathers of children on public assistance (or children who are poor) would be an obvious circumvention of the law as interpreted by the Supreme Court.

of course to all the related policy on this subject described above. If this were done, the result would be that the child's relative could decide to have the substitute parent considered in the family unit. The State would then be required by section 402(a)(7) to consider (i.e. treat as available to the family) the income and resources of the substitute parent, but it would also be required to consider his needs in determining the total family budget. As stated above, however, the decision as to whether an individual shall be treated as an essential person, in any individual case, must be made by the recipient. Thus, any State which makes the inclusion of the essential person mandatory is clearly acting in a fashion inconsistent with the established essential person policy, the statute as we interpret it, and with the Department's regulations on deprivation of parental support and care and its regulations on need.

I hope the discussion has clarified for you the relationship of the Department's policies on essential person and nonassumption of income, and the result of their application to the "substitute father" situation. We believe that the Federal regulations as here explained, are not merely supported but quite clearly required by the current provisions of section 402(a)(7) of the Social Security Act and the Supreme Court's decision in *King* v. *Smith*.

Sincerely yours,

/s/ ALANSON W. WILCOX
General Counsel

Order Denying Motion to Vacate and Motion for Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 50238

GENEVER LEWIS, ET AL., PLAINTIFFS

v.

PAULINE STARK, ET AL., DEFENDANTS

Civil No. 50285

MARGARET PERCY, ET AL., PLAINTIFFS

v.

JOHN MONTGOMERY, ET AL., DEFENDANTS

ORDER DENYING MOTION TO VACATE MEMORANDUM ORDER DISMISSING COMPLAINT AND DISSOLVING THREE-JUDGE COURT AND MOTION FOR REHEARING

This cause having come on to be heard on March 7, 1969, on plaintiffs' motion to vacate memorandum order dismissing complaint and dissolving three-judge court and motion for rehearing, and the court having heard argument of counsel, and being fully advised, it is

ORDERED that the motion be and the same hereby is denied.

Dated: March 12, 1969.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 560 Misc., October Term, 1969

GENEVER LEWIS ET AL., APPELLANTS

v.

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be and the same is hereby, granted.

November 10, 1969

SUPREME COURT OF THE UNITED STATES

No. 560 Misc., October Term, 1969

GENEVER LEWIS ET AL., APPELLANTS

v.

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, ET AL.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 829 and placed on the summary calendar.

November 10, 1969

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JOHN F. DAVIS,

In the Supreme Court of the United States

OCTOBER TERM 1969

No. 560 Misc. 829

GENEVER LEWIS, et al.,
Appellants,

vs.

JOHN C. MONTGOMERY, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

[redacted] STATEMENT NOT PRINTED.

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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 560 Misc.

GENEVER LEWIS, et al., *Appellants,*

vs.

JOHN C. MONTGOMERY, et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

Pursuant to Supreme Court Rule 16(1)(c), appellees in the above-entitled case hereby move to affirm on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The Memorandum Opinion of the court below is unreported, but is set forth in Appendix A, attached hereto.

STATUTES AND REGULATIONS INVOLVED

California Welfare and Institutions Code section 11351 is set forth in full in Appendix B. Regulations of the California State Department of Social Welfare, viz., Public Social Services Manual sections 42-515, 44-101, 44-113.23-.24, 44-133.5, are set forth in Appendix C.

Section 402(a)(7) of the Social Security Act [42 U.S.C. § 602(a)(7)], as it existed both before and after amendment in 1967, is set forth in Appendix D. The regulation of the Department of Health, Education & Welfare which purports to implement that section of the Social Security Act, is section 203.1 of Part 45, Code of Federal Regulations, and is set forth in Appendix E, together with its predecessor, now obsolete, sections 3131(7) and 3120 of Part IV, HEW Handbook of Public Assistance.

QUESTIONS PRESENTED

1. Can the Department of Health, Education and Welfare, by administrative regulation, preclude the State of California, in determining the extent of need of an AFDC[1] child, from considering income and resources of a stepfather or man "assuming the role of spouse" to the child's mother, when such a man is obligated by California law to support the child and when the Social Security Act requires California, in determining the child's need, to consider income and resources of any individual living in the home with the child?

2. The State of California legally obligates a stepfather and a man assuming the role of spouse to provide support

1. "AFDC" refers to the Aid to Families With Dependent Children program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§301-1394), and in which the State of California participates (Cal. Welf. & Inst. Code §§ 11200-488).

for the children of his "adopted family" if he is able to do so and if the family otherwise would require AFDC assistance. Consistent with that legal obligation and with the Fourteenth Amendment, can the State of California decrease the amount of public support of that family by the amount that the father or man assuming the role of spouse is obligated to provide it?

STATEMENT OF CASE

The appellants and intervenors-appellants are mothers and their children, all applicants for, or recipients of, public assistance pursuant to the Federal-State program of Aid to Families with Dependent Children (AFDC). The natural fathers of the children are absent from the homes but in each of the homes there is a "substitute" father who has establish a "marital" relationship with the mother in varying degrees of formality, some actually having married the woman, and others merely having assumed the role of spouse. For the purposes of this case, the legal issues do not turn on whether the woman has ceremonially married, or simply acquired a man assuming the role of spouse, and thus, we refer hereinafter to "Mrs. Lewis" as representative of all appellants.

The defendants-appellees are John C. Montgomery, the Director of the California State Department of Social Welfare, and various welfare officials of the California counties of San Francisco, Alameda and San Mateo.[2] We refer hereinafter to all appellees as "the State of California."

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2. The Aid to Families With Dependent Children program is administered by the County Welfare Department in accordance with the rules of the California Department of Social Welfare under the direction of Appellee John C. Montgomery.

Mrs. Lewis sought declaratory and injunctive relief against enforcement of California Welfare and Institutions Code section 11351 and related implementing administrative regulations.[3] That statute, and the regulations, impose upon a stepfather and upon a "man assuming the role of spouse" (hereinafter referred to as "MARS"), an obligation to support the children of his "wife"—ceremonial or common law—if he is able to do so and if without such support the children would be eligible for public assistance.

The asserted bases for the relief sought were that the California laws were contrary to the Social Security Act and implementing regulations of the Department of Health, Education and Welfare ("HEW"), and that the state laws caused denials of due process, equal protection, and right of privacy.

The State of California moved to disolve the three-judge court for lack of a substantial federal question and to dismiss the complaints without leave to amend for failure to state a claim. The motions were granted on December 19, 1968, and rehearing denied on March 12, 1969. A motion by the Secretary of Health, Education and Welfare to intervene also was denied on March 12, 1969.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. Introduction

The Aid to Families with Dependent Children (AFDC) program is a federal-state cooperative venture established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394) in which the State of California participates (see Cal. Welf. & Inst. Code §§ 11200-488).

3. See Appendices B and C for text.

Under the program, public assistance is provided to a "dependent child," defined by the Act as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who lives with one of a specified list of relatives. 42 U.S.C. § 606(a)(1965).

A pertinent provision of the Social Security Act, regarding the determination of eligibility of, and the computation of the amount of assistance to, a family with a dependent child, requires that

> "The State agency *shall,* in determining need, *take into consideration any other income and resources of any child* or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative)* whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821 (emphasis added).

The dispute in this case centers on the issue of the method in which California "takes into consideration" the resources of the child when there is a stepfather or MARS present in the child's home. California obligates the stepfather or MARS to support the child if he is able and if, without support, the child would need AFDC assistance. Cal. Welf. & Inst. Code § 11351 (Appendix B). The man's ability to pay support is determined according to established standards of income and allowable deductions (see Appendix C). The amount of the AFDC grant is then reduced in the amount which is thereby determined to be, and is by law, available to the child.

The Department of Health, Education and Welfare, on the other hand, issued regulations in 1968 which purport to prohibit California from considering the income and resources of a MARS or stepfather as being available to a child, unless there is "proof of actual contributions." 45 C.F.R. § 203.1 (See Appendix E).

The conflict between the state and federal rules is clear. However, as the District Court held, there is no Supremacy Clause problem because the federal regulation is invalid and, therefore, the California law need not give way to it. Moreover, the California statute and administrative regulations comport with the requirements of the Fourteenth Amendment.

II. The HEW Regulation Contravenes the Command of the Social Security Act and Infringes Upon An Area Reserved to California For Determination and Is, Therefore, Invalid.

The Social Security Act commands the State of California, in determining the degree of need of children, to consider *any* other income and resources of any *child* or of *any other individual* living in the home with the child. 42 U.S.C. § 602, as amended, *supra*. California has complied with this directive by imposing a child-support obligation upon a MARS or stepfather (Cal. Welf. & Inst. Code § 11351). Thus, his net income is, by law, a resource of the child, which California considers in modifying the grant of aid to the child.

The Department of HEW requires, however, that despite the California-imposed legal support duty on *all* "fathers" —natural,[4] adoptive,[5] stepfather and MARS[6]—the State can

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4. Cal. Civ. Code §§ 137, 137.2. 139, 143, 196, 196a, 199, 230; Cal Pen. Code § 270.

5. Cal. Civ. Code § 228.

6. Cal. Welf. & Inst. Code § 11351.

consider the MARS' income only if it proves that the man actually pays for the child's support. 45 C.F.R. § 203.1(b). Thus, HEW has attempted to preclude California from considering resources of the MARS, which by California law are available to, and a resource of, the child. This regulation is in direct conflict with the directive of Congress and thus invalid. It was issued in excess of the delegated authority of the Secretary of HEW to make "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302 (1965).

As this Court has articulated the underlying policy of the AFDC program, Congress intended to provide public assistance and reasonable economic security to children who lacked a "parent." A "parent" is a "breadwinner" and "an individual who owed to the child a state-imposed legal duty of support." *King v. Smith*, 392 U.S. 309, 329 (1968). Thus, to the extent that a "breadwinner" is present in the home, if he is obligated to support "his children," Congress reasonably expected that he, rather than the public, would provide the support. *King v. Smith, supra*, 392 U.S. at 329. California obligates MARS and stepfathers to provide support and shares Congress' expectation that they will do so.

Indeed, HEW appears to concur in this expectation—but only with respect to natural or adoptive parents or stepparents. 45 C.F.R. § 203.1. It allows California to assume the availability of income for the children of these ceremonially-married fathers provided that they are legally obligated by state law to support the child. Yet HEW disallows a similar assumption with respect to a MARS, even though in California he also is under a similar legal duty of support. The illogic of HEW's distinctions is apparent. It is not the degree of sanctity of the "marriage" of the father which should be determinative of the likelihood of

support of the child. The expectancy factor of forthcoming support rests on the state imposition of a support duty and not on whether or not there has been a church or courtroom marriage ceremony. This Court has noted the clear "intent of Congress that the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." *King v. Smith, supra,* 392 U.S. at 332. A MARS in California is such a "parent" and California must, by the Act, consider his income and resources.

The Department of HEW can do no more than adopt regulations which will effectuate this will of Congress. "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. C.I.R.,* 297 U.S. 129, 134 (1936). We acknowledge that the Secretary has the "power to fill up the details," *United States v. Shreveport Grain and Elevator Co.,* 287 U.S. 77, 85 (1932), of the Social Security Act, but "where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland v. Helvering,* 298 U.S. 441, 447 (1936); and *cf. King v. Smith,* 392 U.S. 309, 333 n. 34 (1968).

Moreover, not only is the HEW regulation in conflict with the Social Security Act, it also violates the principle, clearly established by Congress, that the states have the prerogative to set the standards for determining "need," and thus, eligibility, under the AFDC program. The District Court has stated this in a succinct and cogent fashion as follows:

> "[T]his court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the 'AFDC program is based

upon a schen e of cooperative federalism.' *King v. Smith*, 392 U. S. at 316. Under this scheme, the states have the sole esponsibility for determining the standard of econom ic security. Moreover, the legislative history of the A t makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n. 14. As one Repre sentative said during the floor debates, 'need is to be determined under the State law.' *Id.* at 319 n. 14. Ca ifornia has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from: (a) statutorily imposir g an obligation of support on the MARS to the extent f his ability; (b) determining that to this extent the ch ld is not needy; and (c) reducing the child's assista nce accordingly. As the Supreme Court has pointed ut, this authority was intended for the states prior t the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward with out change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)" Appendix A at 8-9, *infra*.

III. The California Budgetary Rules Comport With Fourteenth Amendment Requirements.

Mrs. Lewis com plains that California Welfare and Institutions Code sect on 11351 denies her due process of law because it create an irrebutable presumption that the MARS in her hon e actually is supporting her children and requires a reducti n in her AFDC grant accordingly. Jurisdictional Stateme t 19-26. Implicit in this argument is Mrs. Lewis' mistaken n tion that the AFDC program guarantees welfare assistanc to all legally fatherless children unless some man *actuall, is supporting* them. In other words, she urges that despit the presence in her home of a "breadwinner," whom t e California statute obligates to provide child support, she remains totally eligible for public assist-

ance unless that man wishes, and does, comply with the law by paying the support he owes.

However, this Court has explicitly stated that:

"The AFDC program, however, was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* Implicit in this statement is the assumption that children would in fact be supported by the family 'breadwinner.'

"The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H. R. Rep. No. 615, 74th Cong., 1st Sess., 19 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629, as amended, 42 U.S.C. § 606(a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

• • •

"Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." *King v. Smith*, 392 U.S. 309, 328-29 (1968) (footnotes omitted) (emphasis added).

Mrs. Lewis' children are not ones whom Congress intended to benefit from AFDC since they live in a home with both a mother *and a (MARS) father* who *must* support them, and whom California, as Congress, assumes will support them. "*[T]he fact that the man in question does not actually support the child cannot be determinative,* because a natural *father at home may fail actually to support his child but his presence will still render the child ineligible* for assistance." *King v. Smith, supra,* 392 U.S. at 329 (emphasis added).

Thus the fact that Mrs. Lewis is "prohibited" from proving that the MARS is not, in fact, complying with the law and supporting the children is not a denial of due process. It does Mrs. Lewis no good to prove non-support because it is the MARS' presence coupled with his statutory support obligation which renders the family ineligible, or less eligible, for AFDC assistance. Actual support payments are not determinative.

Mrs. Lewis demonstrates displeasure with the *level* of income which application of the California law establishes. See Jurisdictional Statement 20-21. She complains that operation of the California law compels the MARS to "eschew any charities, activities, entertainments or other pleasures he might otherwise enjoy" and to "forego . . . his car, his television, and anything else, including real property, being purchased on installment credit . . . ." Jurisdictional Statement 20. As welfare recipients they claim the right to all of these things, plus the pleasures of "marriage," but with no formalities and no obligations attached. And they complain that the California laws which prohibit such an Elysian state, deny them due process. The argument is both novel and absurd. "There is no question that States have considerable latitude in allocating their AFDC

resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King v. Smith, supra,* 392 U. S. at 318-19 (footnotes omitted.) Mrs. Lewis should direct her efforts toward the California Legislature, and not this Court, in her desire to have the amount of welfare benefits increased.

Moreover, California's rules apply equally to all potential AFDC recipients. There is no denial of equal protection to MARS or to the children in their home. California obligates natural fathers, adoptive fathers, and stepfathers to support their children,[7] assumes that they will do so, and because of that obligation and assumption, the children are ineligible for AFDC. Exactly the same principles apply to MARS, as of course they must. To allow the child in the MARS household, but not the child whose parents are legally married, to continue to receive public assistance would be to deny equal protection to the latter class. The only distinguishing feature between a MARS and the other fathers is that the latter have formalized their marriage relationships. But since California compels them all to support their children, they all must be deemed to be "breadwinners" whose resources and presence in the home must be and are equally determinative of AFDC-eligibility.

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7. See nn. 4, 5, 6, *supra.*

CONCLUSION

The questions presented by this appeal are not substantial. Appellees move that the decision of the three-judge district court dismissing this action be affirmed.

Dated: September 4, 1969

Respectfully submitted,

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Appendix A

Opinion Below

In the United States District Court for the Northern District of California

Filed Dec. 23, 1968

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, *Plaintiff,* vs. PAULINE STARK, et al., *Defendants.*	Case No. 50238
MARGARET PERCY and MELVIN JONES, et al., *Plaintiffs,* vs. JOHN MONTGOMERY, et al., *Defendants.*	Case No. 50285

MEMORANDUM OPINION

Before: Hamlin, U. S. Circuit Judge, and Zirpoli and Wollenberg, U. S. District Judges

Plaintiffs seek in their own behalf and as representatives of their respective classes to have this court declare that section 11351 of the California Welfare and Institutions Code, and the related sections of the California Public Social Services Manual (PSSM), are contrary to federal regulations interpreting the Social Security Act and are unconstitutional.

The original plaintiffs in this action were Genever Lewis (Civ. No. 50238) and Margaret Percy (Civ. No. 50285). These plaintiffs sued on behalf of themselves, their children, a man assuming the role of spouse (MARS) in the Percy home, and all other individuals similarly situated. Motions to intervene were made prior to the date set for consolidated hearing, and those motions brought before this court two families with a stepfather instead of a MARS, as well as a third family with a MARS. By virtue of the circumstances of the original plaintiffs and the intervenors, leave to intervene would appear mandatory, Fed.R.Civ. Proc. 24(a). Any findings of this court contrary to the interests of the MARS would apply a fortiori to the stepfather. For this reason the motions to intervene in No. 50285 are granted to Virginia Sims, Mary J. Garner, Bertha Bell and their minor children, and to Humberto Garcia and his minor child, and Haywood Bell. For this reason also this court will refer only to the claims raised by the MARS and will not treat separately the claims of the stepfather, as we deem it unnecessary to do so.

I
INTRODUCTION

The federal government maintains in cooperation with the states, a program of assistance to families with dependent children (AFDC). According to one provision of the controlling federal statute, the Social Security Act, "A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, as well as any expenses

reasonably attributable to such income. . . ." 42 U.S.C. 602(a)(7). The federal government and the state of California are in disagreement as to the proper method of taking "into consideration any other income and resources of any child" when there is present in the family a "man assuming the role of spouse." Regulations issued by the Department of Health, Education and Welfare in August, 1968 permit a state to take into account contributions from a MARS only if there is "proof of actual contributions".[1]

California proceeds differently. It obligates a MARS to support the children in the home if he is able. "/A/n adult male person assuming the role of spouse . . . *is bound*

---

1. 45C.F.R. § 203.1:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of *proof of actual contributions.* (Emphasis added).

to support, if able to do so, his wife's children if without support from such . . . adult male person they would be needy children eligible for aid under this chapter." Cal. Welf. & Inst. Code § 11351 (emphasis added).[2] The MARS' ability is determined by the state according to established categories of allowable income and deductions. Under California's statute and regulations, the amount of assistance to the needy family is reduced by the amount of income which the state has computed to be available from the MARS.[3] Under the HEW regulations, the amount of assist-

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2. Section 11351 reads in full as follows:

"Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expense under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, 'adult male person' means any male person of age 18 years or older."

3. The statute is set forth in note 2, *supra.* The following regulations are contained in the Public Social Services Manual:

42-535 Responsibility of man assuming the role of spouse.

AFDC .1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

ance may be reduced only by the amount of proved contributions. Thus the situation can arise in California where

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.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.2 *Responsibility of Man Assuming Role of Spouse for Support* The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

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44.133 Treatment of Income (Continued)

AFDC .5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all the children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the AFDC assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for AFDC as a separate case if his income is less than the need.

the state will regard the family to be living on money which the MARS is actually spending for purposes not recognized by the allowable deductions (living expenses, job-related expenses, court-ordered child support payments and medical care). Therefore, despite the presence in the home of a MARS earning sufficient income to support the family, the family may still be in actual need. Under the HEW regulations the family is considered needy; under California law it is not.

Plaintiffs, representing mothers, children, stepfathers, and MARS in families whose assistance has been modified under California's statute and regulations cite the HEW regulation, and the equal protection clause, the due process clause, and the right to privacy as bases for overturning the California practice to which they object. Plaintiffs seek a temporary order restraining the enforcement of the California budgetary rules, and declaratory and injunctive relief. This three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, and jurisdiction rests on 42 U.S.C. § 1983. Defendants have moved to dissolve the three-judge court for lack of a substantial federal question and to dismiss the complaint without leave to amend for failure to state a claim.

II
HEW REGULATIONS

Plaintiffs contend that the HEW regulations must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations, to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources

of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

The HEW regulations, however, bar from state consideration resources controlled by a MARS. It is just these resources that California takes into account under Welf. & Inst. Code § 11351. The statute obligates the MARS to support the children in the home to the extent he is able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression mandate, are, in the view of this court, invalid. They exceed the Secretary's authority to make "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302. The Secretary has, of course, the "power to fill up the details" *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 85 (1932), but he is nevertheless "required to follow Congressional mandate, whether explicit or ascertainable in underlying policy." *United Steel Workers of America v. N.L.R.B.*, 390 F.2d 846, 851 (1968). The

Supreme Court recently articulated the underlying policy by saying "that Congress expected 'breadwinners' who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was *legally obligated* to support his children." *King v. Smith,* 392 U.S. at 329, (emphasis added). The HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope. California, on the other hand, shares the congressional expectation. By creating a rule out of harmony with the enabling statute, HEW has created a mere nullity. *Manhattan General Equipment Co. v. C.I.R.,* 297 U.S. 129, 134 (1936). California, therefore, is not in conflict with any valid federal law.

In addition to upholding the California practice for the reason that the HEW regulation violates the policy of the Social Security Act, this court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the "AFDC program is based upon a scheme of cooperative federalism." *King v. Smith,* 392 U.S. at 316. Under this scheme, the states have the sole responsibility for determining the standard of economic security. Moreover, the legislative history of the Act makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n.14. As one Representative said during the floor debates, "need is to be determined under the State law." *Id.* at 319 n.14. California has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from; (a) statutorily imposing an obligation of

support on the MARS to the extent of his ability; (b) determining that to this extent the child is not needy; and (c) reducing the child's assistance accordingly. As the Supreme Court has pointed out, this authority was intended for the states prior to the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward without change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)

III
EQUAL PROTECTION

Plaintiffs claim that the challenged provisions of California's welfare program deny equal protection to two classes: (1) needy children who reside with a MARS, and (2) the MARS himself. The thrust of plaintiffs' objection is that the classifications drawn by the legislature are not reasonably related to the purposes of the statute, and that it is unconstitutional to impose on the children and the income-earning MARS in a family receiving AFDC payments a burden that is not imposed on AFDC children without an income-earning MARS or on a MARS living with a non AFDC family.

In resolving conflicts turning on equal protection, this court is guided by the content given to the equal protection clause by the United States Supreme Court. In *Morey v. Doud,* 354 U.S. 457, 463-64 (1957), the Court offered four rules for testing discrimination in social legislation. First, the equal protection clause does not deprive the states of a "wide scope of discretion", and a statute having a reasonable basis will be upheld. Second, a failure of "mathematical nicety" or the creation of "some inequality" is not offensive to the equal protection clause. Third, a classification will be sustained "if any state of facts reasonably can be

conceived that would sustain it." Fourth, the burden is on the attacker to show no reasonable basis. This test has been applied to strike down a state statute excepting a named company from state regulation, *Morey v. Doud, supra;* to strike down a state rule prohibiting illegitimate children from bringing a wrongful death or survival action for the death of their mother, *Levy v. Louisiana*, 391 U.S. 68 (1968); and to strike down a state rule selectively prohibiting the mother of an illegitimate child from recovering for injury or death to the child in some circumstances but not in others, *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). The Supreme Court could find no possible rational basis for these legislative classifications.

Turning to the contentions raised by plaintiffs in the present case, this court first finds that there is no discrimination of any sort in regard to the AFDC children. Plaintiffs complain that the mere presence of the MARS puts the children in an "inferior status", and seek vindication by making an analogy to the *King* case. Plaintiffs' line of argument is erroneous for the reason that the modification of assistance takes place equally for all AFDC children if they have other resources available to them. Children in a MARS family are not discriminated against. They receive equal treatment with all other children receiving AFDC assistance.

Plaintiffs' analogy to the *King* case and characterization of the California practice as a subtle version of Alabama's statute are highly inaccurate. In *King*, the man found by Alabama to be a substitute father lived with his own family and made no income or resources available to the supposed "substitute" child and its mother and clearly had no ability to contribute to their support. Worse, the Alabama regulation made deprived children ineligible for aid due solely to the sexual conduct of their parent. Thus, the *King* case

raised "only the question whether the State may deal with these problems [of immoral conduct and illegitimacy] in the manner it has here—by flatly denying the AFDC assistance to otherwise eligible dependent children." 392 U.S. at 320.

This case is quite different. Here we have a California statute and regulations which deal with a man who actually is "in or around the home" and either assumes financial responsibility or represents himself to the community as the husband or father, not one who, as in *King*, had an occasional rendezvous with the mother. More importantly, California does not disqualify otherwise eligible needy families for aid because of the mother's sexual behavior; it simply considers the man's income in computing the welfare grant. It provides for a reduction of payments to the extent the man has *actual* ability to support.[4] The state of California does not reduce welfare grants because of the frequency of sexual relations or the presence of illegitimate children, but because of the actual presence of a breadwinner in the home of the applicant or recipient of aid. That breadwinner must, if able to do so, support his "adopted" child.[5]

Thus, California, unlike Alabama, does not deny or modify AFDC grants to "destitute children who are legally fatherless . . . on the transparent fiction that they have a substitute father." 392 U.S. at 334. California determines whether a legally fatherless child is destitute before granting, limiting or denying aid, and that determination includes the 'reasonable' inquiry whether the child has a MARS to look to for support which the state obligates him to provide.

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4. See note 3 *supra*.

5. See note 2 *supra*.

This court can easily conceive of rational purposes that justify the modification of assistance in light of a MARS' net income. To the extent that the number of beneficiaries and the amount of their assistance can be reduced according to their administratively determined need, it may be possible to increase the amount of assistance to other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations. Also, it is certainly permissible for any program of government spending to minimize expense where possible, and the net income of a MARS living with recipient children is a rational incident for such expense minimization.[6]

It is not invidious for the legislature to eliminate the financial bonus that would, in the absence of California budgetary rules, accrue to unmarried couples receiving AFDC benefits. In the absence of the obligation imposed by Welf. & Inst. Code § 11351, a MARS could engage in all aspects of family life while shifting the expense of supporting the children in the home from himself to the state. By imposing the support obligation on the able MARS, the state was justifiably eliminating this evasionary device.

Moreover, in cases where the AFDC child's natural father has established a new family, the legislature was making the socially advantageous choice of permitting the natural father to devote his resources to his new family so long as the MARS is able to provide support for the AFDC family.

In this context, the court is unable to say that California acts toward AFDC recipients in a MARS family in a way that is invidiously discriminatory. *Levy v. Louisiana, supra.* The plaintiffs have failed to discharge their burden of showing that the California budgetary rules have no reasonable

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6. See Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 775-76 (1966).

basis. We therefore find that the program for assistance modification does not deny AFDC children equal protection of the laws.

Plaintiffs' second argument that the MARS is denied equal protection is likewise without merit. Plaintiffs contend that, because the support obligation of a MARS exists only for children receiving AFDC assistance, the MARS in a welfare family is treated differently from a MARS in a nonwelfare family. This contention is of course true, but it is also irrelevant. The obligation imposed on the MARS in an AFDC family is part of a comprehensive pattern of child-support statutes directed variously at natural parents, Cal. Civ. Code §§ 137, 137.1, 137.2, 139, 143, 196, 196a, 199, 230, and Cal. Pen. Code § 270; adoptive parents, Cal. Civ. Code § 228; and stepfathers and men assuming the role of spouse, Welf. & Inst. Code § 11351. These obligations differ according to need and to the nature of the "parental" relationship. To be sure, a MARS in a non-AFDC family is free of support obligations. But this court cannot say that the "discrimination" against the MARS in the AFDC family results from a distinction that has no relevance to the purpose for which the classification was made. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). It is not invidious for the legislature to recognize that in a society of many cultures and many impoverished individuals, perfectly stable, though informal, families will inevitably arise.[7]

This court is not unaware that the state's policy may induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the

7. tenBroek, *California's Dual System of Family Law (III)*, 17 Stan.L.Rev. 614, 617-19 (1965).

MARS. Men who respond to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence. Nevertheless, this court cannot say that the California legislature has been wholly arbitrary in incurring this risk. As some commentators have observed, the only employable males likely to be thus influenced to forsake their "families" would be "(1) those who would rather use their own income on themselves to the exclusion of their families, and (2) those who would be tempted to desert their families simply because the taxpayers' contribution to the family's income is eliminated."[8] This court cannot say that California has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners. To be sure, "any policy is likely to produce some undesirable side effects",[9] but we believe that these consequences are within the boundaries of the equal protection clause. Plaintiffs' second objection, therefore, must fail.

IV
DUE PROCESS

Earlier in this opinion, we mentioned the possibility that California will regard a family seeking AFDC assistance as living on money deemed available from the MARS even though actually put to other uses. This situation arises where the MARS makes expenditures that are not covered

8. Lewis & Levy, *supra*, note 6, at 779-80.
9. *Id.* at 776.

by the state-allowed deductions for living expenses, job-related expenses, court-ordered child support paymetns, and medical care. Money spent for other, non-deductible, purposes is deemed by the state to be net income available to the family. Under Welf. & Inst. Code § 11351, such net income is required to be applied to the needs of the family. To the extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the reduction though the MARS fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis of those non-existent facts. Yet closer analysis entirely dispels the persuasiveness of plaintiffs' claim.

First, we repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. Welf. & Inst. Code § 11351. We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made.[10]

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10. tenBroek, *supra*, note 7, at 657.

Second, we conclude that even if the available deductions have been too narrowly drawn to suit the preferences or style of life of some MARS, the effort to enlarge these categories must be directed to the legislature, not the courts. The days are over when the due process clause may be used to strike down state laws thought "unwise, improvident, or out of harmony with a particular school of thought". *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). We admit that the assumption of available resources will accurately reflect the facts for one particular family but not for another. Similarly, however, the restriction of certain optical practices to licensed opthalmologists or optometrists will accurately reflect the ability of one particular unlicensed person but not of another. *Williamson, supra.* Again, permitting only practicing lawyers in the state to engage in "debt adjusting" may accurately reflect the abuse that would otherwise be imposed on distressed debtors by one particular nonlawyer, but not by another. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). In light of these Supreme Court decisions upholding irreversible determinations as to the undesirability of allowing unlicensed persons and nonlawyers to engage in certain activities, this court must uphold over due process objections, California's irreversible determination that a MARS' net income, as computed by the state, is available to AFDC recipients.

V

RIGHT OF PRIVACY

Plaintiffs' final contention is that enforcement of the state's budgetary rules violates a MARS' right of privacy. We agree that the state's program may intrude into the private life of the MARS to determine whether he is maintaining an intimate relationship with the mother and to

ascertain his financial status. We also agree that the "notions of privacy surrounding the marriage relationship" protect that relationship from certain intrusions. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Nevertheless, plaintiffs have failed to demonstrate that the practices of the state would be shown at trial to resemble the methods necessary to prove use of contraceptives, which methods were firmly rejected as "repulsive" by the Supreme Court. Proof of an intimate relationship, as required by the California regulations, is a far different matter, and does not require nearly so extensive or detailed an inquiry into the practices of the man and woman. California's regulations therefore fall without the "zone of privacy" recognized in *Griswold* and are not unconstitutional. What we have just said about the inquiry into "intimate relationship" applies a fortiori to the inquiry into the MARS' finances, an inquiry little different from that required for the enforcement of federal and state taxation. This fourth contention of plaintiffs must therefore fail.

VI

California's budgetary rules obligate a man assuming the role of spouse to contribute his income, to the extent that he is able, to an otherwise needy AFDC family. To the extent of the MARS' administratively determined ability, the grant to the AFDC family is reduced. Although this practice conflicts with a recent HEW regulation requiring proof of actual contributions, we sustain it because we find the HEW regulation to be inconsistent with the language and policy of the Social Security Act, an unfounded intrusion into a province reserved by the Act and its legislative history for the states, and therefore invalid.

We further find that California's practice is not prohibited by the equal protection or due process clauses of the constitution, or by the right to privacy announced in *Griswold v. Connecticut*. We therefore find that plaintiffs have not, under color of any state statute, been deprived of any rights secured by the constitution, and that this complaint seeking relief under 42 U.S.C. § 1983 must be dismissed for failure to state a claim upon which relief can be granted. The motions to intervene having been granted, this dismissal is effective as to both the original plaintiffs and the subsequent intervenors.

The dismissal of the complaint renders unnecessary consideration of any of plaintiffs' motions for relief.

In view of the disposition of plaintiffs' claims, this three-judge court is hereby dissolved.

Dated: December 19, 1968

O. D. HAMLIN
United States Circuit Judge

ALFONSO J. ZIRPOLI
United States District Judge

ALBERT C. WOLLENBERG
United States District Judge

Appendix B

California Welfare and Institutions Code Section 11351.

Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, "adult male person" means any male person of age 18 years or older.

Appendix C

Regulations of California State Department of Social Welfare Appearing in "Public Social Services Manual."

42-515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

.1 *Parents*

The natural parents, married or unmarried, are the parents of the child unless the child has been adopted. The adoptive parents are the parents thereafter.

.2 *Stepfather*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.3 *Unmarried Father*

An unmarried father is a man who is not married to the natural mother of one or more of their children even though he may be married to another woman.

.4 *Man Assuming the Role of Spouse*

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as

spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relation ship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.

c. Man's attendance as parent at children's school function.

d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.

e. Children refer to man as father.

f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.

g. Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.

h. No demonstrable or confirmable alternative living arrangement other than with the AFDC family.

.43 *Substantiation of Relationship*

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

.5 *Common-Law Marriage*

California law, in Civil Code Section 63, recognizes any out-of-state marriage as valid as long as it is valid where contracted or performed. In cases in which there was no formal marriage, it may be that a common-law marriage was established in another state. If the parents state they are married to each other, it is assumed that they are lawfully married unless this is refuted by other evidence.

Interpretation

Basic Requirements - Common-law Marriages

In most of the states which recognize common-law marriages, two basic requirements must be met:

1. *Agreement Must Exist to Become Husband and Wife.* This agreement may consist of a written contract, but usually is just a simple, oral statement such as "I take you for my wife" or "You are now my wife." The words used must be in the present tense, and must express an intent to assume the relationship of husband and wife at the time involved and not at some future time. The parties have capacity to enter the agreement. This means that (1) they must be of sound mind; and (2) they must be of the minimum age. At common law and in most states which recog-

nize common-law marriage, the ages are 14 for the male and 12 for the female.

2. *Must be Cohabitation Following the Verbal or Written Statements.* Cohabitation is described as living together as husband and wife, each assuming the marital duties implicit in the relationship, usually including but not necessarily predicated on, sexual relations.

If these two facts are established and the state where they occurred recognizes common-law marriages, a marriage is in existence which is valid for all purposes in California and which can only be dissolved by formal divorce even in the state in which it was created. There is no such thing as an informal divorce in the United States.

44-101 INCOME DEFINITIONS

Income, generally, is any benefit in cash or in kind which is in fact currently available to the individual or is received by him as a result of current or past labor or services, business activities, interests in real or personal property, or as a contribution from persons, organizations or assistance agencies. To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period. Subject to this limitation and the exemptions and exclusions, as specified in Section 44-111 of this chapter, such benefits are taken into consideration as income in evaluating the need of the recipient and in determining the amount of assistance to which he is entitled.

.1 *Separate Income*

.11 Separate income is derived from an interest in separate property; or,

.12 Income resulting from employment or military service rendered prior to the present marriage.

.2 *Community Income*

.21 Community income is generally income derived from an interest in community property; or,

.22 Income resulting from employment or military service performed during the present marriage or being performed at the time of the present marriage. *However:* If the applicant or recipient of *AB, APSB, ATD* or *OAS* has relinquished his community interest in his spouse's earnings by oral or written agreement, such income is separate income of the spouse. If it is determined that the agreement was made for the purpose of qualifying for aid or for a greater amount of aid, such income is considered community income. Earnings of an ineligible spouse up to $200 monthly net are not considered as community income. (See Section 44-131.132 and W&IC 11012); or

.23 Income from the earnings of a minor child in the home unless the child is free from parental control.

.3 *Current Income*

.31 *Current income of a recipient* is income received in the current month regardless of the period over which it accrued. *However:* (1) interest payments in decreasing amounts may be averaged; (2) if all or a portion of a cash gift or a non-recurring lump-sum payment is determined to be income, it is considered "current income" in the month following receipt (see Section 41-309.3); (3) recurring lump-sum income is considered "current income" in the

months to which it is apportioned, starting with the month following its receipt (see Section 44-135.)

Any unexpended portion of current income becomes personal property on the first of the month following receipt of the income.

.32 *Current income of an ineligible spouse* is income received in the current month regardless of the period over which it accrued. Income which is temporary, received periodically, or fluctuates substantially from month to month, shall be treated as current income by converting it to a single monthly money amount based on an average of the anticipated income for the calendar year. This single amount shall be considered as the continuing monthly income from such source until a redetermination is made because of a change in circumstances not anticipated in the original determination. (For Net Income, see Section 44-113. For Division of Income with Spouse and Minor Children, see Section 44-131.1.)

Interpretation—The fact that the actual amount of income received by the ineligible spouse in a given month varies up or down from the estimated average does not mean that the determination regarding allocation to the recipient is necessarily incorrect. As long as the estimated average is a valid one, such estimated income is treated in the same manner as if it were actually received that way.

The reporting responsibility of the recipient and spouse must be considered carefully and agreed upon with them. It will generally be desirable to have all actual amounts of income received by the ineligible spouse reported monthly so that any substantial increase or decrease which would materially alter the anticipated average for the year can be considered and, when indicated, adjustment in the projected average made.

When the income of the ineligible spouse has been determined by reasonable estimate, the amount so determined is not subject to adjustment or correction on an after-the-fact basis with respect to aid already paid except as follows:

1. When the predicted income decreases substantially in a manner not anticipated and such decrease is reported promptly; or

2. When the information on which the estimate was based was incorrect or became incorrect as the result of the recipient and/or his spouse withholding or misrepresenting facts which resulted in the recipient receiving aid to which he was not entitled.

.4 *Casual Income and Income from an Inconsequential Resource*

.41 *Casual income* and inconsequential assistance is income in cash or in kind which is: (1) unpredictable as to amount and time of receipt; (2) of short duration; and (3) of negligible importance in meeting continuing needs under the appropriate aid standard.

.42 *Income from an inconsequential resource* is the net return from an interest in real or personal property which makes no appreciable contribution to the continuing needs of a recipient under the aid standard. (W&IC 11009)

Interpretation—Casual income, inconsequential assistance, and income from an inconsequential resource are excluded by code from consideration as income in determining the amount of the assistance payment.

The Federal Social Security Act provides that in determining need, "any income and resources" of the individual must be considered except a specified amount of earned income. It is not possible to define casual income

or income from an inconsequential resource in terms of specific money amounts, a percentage of the grant, a specific number of days employment or any other such method which would tend to minimize individualization of the determination. Rather, circumstances must be evaluated in relation to the individual case to determine if the income is really insignificant and of negligible importance in meeting the needs of the recipient.

The following examples illustrate some types of income which usually are considered casual income or income from an inconsequential resource:

a. Income from occasional labor and services of a temporary nature and which offer no security as a regular source of maintenance.

b. Income from occasional sale of products or resulting from work engaged in wholly or primarily for its therapeutic value, such as knitting, art work, cabinet work, etc.

c. Income from occasional rental of a room which is not ordinarily advertised or listed for rent and which is rented for a short period only.

d. The value of the usual small gifts in kind given in commemoration of holidays and anniversaries; or a gift in kind earmarked for a specific purpose and not useful for meeting the continuing needs of the recipient, such as a gift of a ticket for a trip. Gifts of personal property such as a radio, refrigerator, etc. (Irregular nonrecurring gifts of money are considered personal property pursuant to W&IC 11157.)

e. Returns from home produce from garden, orchard, farm livestock, poultry, firewood, etc., which is sold or exchanged.

f. Interest on securities which has no appreciable significance in meeting continuing needs.

g. Result of occasional barter transactions, such as the exchange of wood produced on the recipient's property for work on the road leading to his house.

h. Dues and membership fees in benevolent, fraternal or other non-profit organizations which are assumed by the organization or by another person on behalf of the recipient.

i. Emergency relief granted a recipient who has lost or spent his grant.

j. Interest on a savings account in a bank, savings and loan association, or other institution authorized to accept savings. (W&IC 11009)

k. Free board and lodging received by a recipient during a temporary absence from his home of not more than one month. (W&IC 11009.1.)

.5 *Earned Income*

Earned income is income received in cash or in kind as wages, salary, commissions or profit from activities such as business enterprise, farming, etc., in which the recipient is engaged as a self-employed individual or as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock or poultry (other than sale of an entire holding). (See Section 44-135.)

Returns from personal or real property, such as net income from rental of rooms, or board and room are considered "earned income" if such returns result from an appreciable and continuous effort on the part of the applicant or recipient.

.6 *Voluntary Contributions*

A voluntary contribution is a contribution for which the contributor has no legal liability. In *ADFC* and *OAS* a contribution by a child is "voluntary" only to the extent that it exceeds the child's legal liability. (See regulations on Responsible Relatives.) Income allocated to an *AB, APSB, ATD* or *OAS* recipient by his spouse as provided in Section 44-131.132 is not considered a "voluntary contribution." However, a contribution to the recipient by a spouse from income which the spouse would otherwise be permitted to retain for his own support, is considered to be voluntary.

.7 *Recurring Lump-Sum Income*

Recurring lump-sum income is: (1) income accrued over two or more months and expected to be received at intervals in the future; and (2) a recurring benefit received less frequently than monthly.

Interpretations—Recurring lump-sum income may include payments received from sources such as crops, pensions, rentals, contributions to meet taxes, stock dividends, salaries, wages or commissions and trust fund payments. Recurring lump-sum income does *not* include:

a. Income received monthly, including any initial lump-sum payment which will be followed by monthly payments from the same source such as OASDI. (Such income is applied toward meeting needs in the month of receipt and any unexpended balance becomes personal property on the first of the following month.)

b. Rental or similar payments covering a one-month period, but received less frequently than

monthly because of vacancies, etc. (Such payments are considered in the same manner as income received monthly.)

.8 *Income in Kind*

Income in kind is any benefit received other than in cash. It includes the value of need items provided at no charge. In *AB, APSB, ATD* and *OAS,* it includes the value of need items which a person, home or institution is obligated to provide the recipient pursuant to a partial life care contract, life lease or other agreement.

44-113 INCOME

.23 *Earnings—AFDC*

In order that the use of family income for expenses entailed in employment will not reduce the money available to meet basic and other needs, such expenses are to be deducted from gross earnings as follows:

.231 All involuntary deductions made by the employer.

.232 The standard allowance for food, clothing, and personal incidentals for employment as set forth in the following table:

TABLE OF STANDARD ALLOWANCES FOR FOOD, CLOTHING AND PERSONAL INCIDENTALS RESULTING FROM EMPLOYMENT

Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance
$4 or less	All income	$13	$11	$22	$18
5	$ 4	14	12	23	19
6	5	15	12	24	20*
7	6	16	13	25	21
8	7	17	14	26	21
9	8	18	15	27	22
10	8	19	15	28	23
11	9	20	16	29	24
12	10	21	17	30	25**

* Maximum allowance for children under age 18.
** Maximum allowance for adult or children age 18 through 20.

.233 All other expenses incurred to retain employment. Such expenses include the cost of:

a. Transportation to and from work and on the job if not reimbursed by the employer.

b. Tools and licenses required for the job.

c. Dues to unions, business organization, employee clubs, or similar assessments.

d. Contributions to collections for employee benefits necessary to holding the job.

e. Necessary educational or training expenses related to employment including any necessary publications.

f. Care of children at or in day care facilities when the caretaker is employed.

g. Special safety devices needed by handicapped people and not furnished by the employer or another agency.

h. Telephone service required in connection with employment.

i. Unusual expenses required for employment.

(See Determination of Need Chapter for allowance for expenses to obtain employment.)

.234 Deductions of expenses of employment for children not attending school and not setting aside an amount for further education or preparation for future employment under a plan agreed upon with the county welfare department are limited. For children 16 or 17 years of age, the deductions are limited to the extent that net income to the family is not less than $4.00 per month. For children 18 through 20 years of age, the deductions are limited to the extent that

net income to the family is not less than $5.00 per month.

.235 When earnings are from self-employment or operation of a business, the expenses in Items .232 and .233 are deducted with all other normal items of expense incidental to receipt of the income. However, principal payments are not allowed except for tools and equipment essential to the employment.

.236 When an entire item of need in the itemized Cost Schedule is met in kind as a result of service performed, the monetary value of the item as shown in the Cost Schedule is income to the family. The expenses in Items .232 and .233 are deducted with all other normal items of expense incurred in securing the income to determine the net income.

.237 Exempt family earned income (as provided in Section 44-111.23) is to be deducted after all deductions for expenses of employment from income are made.

.24 *Other Deductions from Net Income*

In addition to the deductions described above, deductions for other expenses of persons with income from any source, shall be made as follows:

.241 *Court Ordered Support Payment by Natural Parent*

Deduction for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

.242 *Stepfather*

Deduction is made from income for:

a. The support payments actually made to or for his dependents living elsewhere.

b. Alimony payments to his ex-wife in the amount of the court order.

c. The cost of medical care of the stepfather and other persons in the Family Budget Unit for whom there is no federal eligibility as child or caretaker.

.243 *Child's Income*

An amount for the child's future and/or current expenditures related to the maximum development of his capabilities shall be deducted whenever income is received by or on behalf of a child. The purpose of the deduction is to provide an incentive to equip him better to participate in constructive activities in which he otherwise may be restricted. The amount for future and/or current needs must be geared to the child's age, his problems, his capacities, and the plan developed by the county welfare department with the child and family to allow him freedom to use or save income for purposes that promote self-reliance and self-improvement. The amount must be reasonable in relation to the purpose for which it is being set aside.

When the amount deducted, or a portion of it, is to be accumulated and used for *future* needs of the child related to educational, vocational, or employment plans, the funds are to be deposited in a separate account in a legal savings institution in the name of the parent or guardian and the child. Withdrawals

may be made from the account for expenses for carrying out these plans as they arise when current income does not meet them. The county welfare department shall inspect the passbook every three months to insure that deposits and withdrawals are consistent with the plan.

.5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the *AFDC* assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents

the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for *AFDC* as a separate case if his income is less than the need.

Appendix D

Section 402(a) (7) of Social Security Act [42 U.S.C. § 602(a) (7)]

After 1967 Amendment

A State plan for aid and services to needy families with children must . . .(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonable attributable to the earning of any such income.

Before 1967 Amendment

A State plan for aid and services to needy families with children must . . .(7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; except that, in making such determination, the State agency may, subject to limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child.

Appendix E

Regulations of Department of Health, Education of Welfare

Current (45 C.F.R. § 203.1)

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be con-

sidered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

Obsolete (HEW, Handbook of Public Assistance, Part IV)

3131. *Requirements for State Plans*

7. Effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter, the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.

3120. *Interpretation*

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in

determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, *currently* available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

For cases in which income or resources are initially available, but are then discontinued, e.g., cases in which a payment under a court order, or contributions, continue for several months and then cease, assistance payments will need to be adjusted promptly to reflect this change in circumstances.

Assistance payments must be based on need in the light of currently available income and resources. Current payments cannot be reduced because of prior overpayments, if the recipient no longer has the income available, which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available as well as agency overpayments.

No. 829

Brief for U.S. as amicus curiae filed on July 31, 1969

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, *et al.*,

Appellants,

vs.

ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RIS. STATEMENT
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, *et al.*,

Appellants,

vs.

ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

Opinions Below

The memorandum opinion [A. 34] of the court below dismissing the complaints and dissolving the three judge court is officially unreported but is printed at ¶ 9299 CCH Pov. L. Rep. The order denying plaintiffs' motion to vacate the memorandum opinion and motion for rehearing [A. 60] is unreported.

Jurisdiction

This is a direct appeal to this Court pursuant to 28 U.S.C. §§ 1253 and 2101(b) from the final decision of the three judge court of the United States District Court for

the Northern District of California, which was convened in compliance with 28 U.S.C. §§ 2281 and 2284.

The court below had jurisdiction pursuant to 28 U.S.C. §§ 1343(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983, to grant the requested injunctive relief and to declare invalid a California statute and certain statewide regulations of the California Department of Social Welfare. The cases (Civ. No. 50238, filed October 31, 1968, and Civ. No. 50285, filed November 12, 1968, with certain plaintiffs intervening as of right under Rule 24(a), Fed. R. Civ. Proc. [A. 35]) were set for consolidated hearing before the three judge panel on November 26, 1968. Pursuant to defendants' motion to dismiss the complaints, the district court in a memorandum opinion filed on December 23, 1968, rendered its judgment for defendants in both cases and dismissed the complaints. On March 12, 1969, the court below denied plaintiffs' timely motion to vacate and motion for rehearing filed January 2, 1969. At the same time the court denied a motion to intervene by the Secretary of Health, Education and Welfare. Plaintiffs filed a joint notice of appeal on May 8, 1969. The jurisdictional statement was filed on July 7, 1969. On November 10, 1969, the Supreme Court granted plaintiffs' motion to proceed *in forma pauperis* and noted probable jurisdiction (38 U.S.L. Wk. 3173 (No. 560 Misc., Nov. 11, 1969)) and the appeal was docketed (38 U.S.L. Wk. 3185 (No. 829, Nov. 18, 1969)) [A. 61].

Questions Presented

Plaintiffs are needy children and their mothers, who receive Aid to Families with Dependent Children welfare assistance. They depend on recurring grants of such wel-

fare aid to meet in a minimal subsistence fashion the basic essentials of life, including food, shelter, clothing and medical care. The mothers reside with men who are either stepfathers to the children or who are deemed to be assuming the role of spouse to the mother under California welfare law. The needy families suffer reduced welfare grants because California assumes that the man in the house contributes his available income to the needy children. The amount so assumed is not, in fact, available or contributed in spite of a purported legal obligation imposed on a man in the house to provide such support. The grant reductions deny needy children sufficient means with which to meet their basic needs and expose them to extreme hardships and privation. Under these circumstances:

(1) Is the regulation (45 C.F.R. § 203.1), which was promulgated by the Secretary of Health, Education and Welfare (HEW) in order to preclude the continued enforcement of state man-in-the-house rules, but which was held invalid by the court below, a reasonable interpretation of § 402(a)(7) of the Social Security Act (42 U.S.C. § 602(a)(7)) and consistent with the purposes of the Act and the intent of Congress, as interpreted by this Court in *King* v. *Smith*, 392 U.S. 309 (1968);[1]

(2) Does the Social Security Act (42 U.S.C. §§ 601 *et seq.*), as interpreted by this Court, together with the regu-

[1] The HEW regulation was in part a reaffirmation of long-standing rules, prohibiting the assumption of income not available in fact, which were expressly approved by this Court in *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968). *See* Argument, Point I-A, *infra*. The same regulation was recently invoked by a three judge district court in striking down Connecticut's man-in-the-house rule, a decision subsequently affirmed by this Court. *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn., 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

lation held invalid below and long-standing regulations promulgated by the Secretary of Health, Education and Welfare, preclude the grant reductions and terminations effected by California's man-in-the-house rules, which operate to deny needy children the basic subsistence guaranteed by federal law;

(3) Does due process prevent California from erecting an irrebuttable presumption that a man residing in the house with needy children is contributing to their support, and from thereby denying such needy children any opportunity to prove that presumed contributions are, in fact, not made and that the presumption to the contrary is without factual basis; and

(4) Does the guarantee of equal protection of law prohibit California from distinguishing between classes of equally needy children by denying, reducing and terminating federal welfare assistance to that class of needy children whose mother has a man in the house, when the classification rests solely on the irrebuttable and demonstrably false presumption that such a man contributes to their support, and when his presence in the home bears no reasonable relationship to the purposes of the AFDC program?

Statutes and Regulations Involved

The rights asserted herein arise under Title IV of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601 *et seq.*, and under regulations promulgated by the Secretary of Health, Education and Welfare (HEW). The relevant sections of the Act, 42 U.S.C. §§ 601 and 602(a)(7), are set forth as Appendix A, *infra*, p. 63. The HEW regulation declared invalid by the court below, 45 C.F.R. § 203.1,

is set forth as Appendix B, *infra*, pp. 64-65. The following regulations from Part IV of the HEW *Handbook of Public Assistance Administration* (hereafter HEW *Handbook*) are set forth in Appendix C, *infra*, pp. 66-70: §§ 3120, 3123, 3124, 3131(7), 3131(10), 3131(11).

The state statute drawn in question is California Welfare and Institutions Code (hereafter Calif. W. & I.C.) § 11351; it is set forth in Appendix D, *infra*, p. 71. Statewide administrative regulations of the California Department of Social Welfare are set forth, as they existed at the time the suits were commenced, in Appendix E, *infra*, pp. 72-81. Regulations which have superseded certain provisions originally involved are set forth in Appendix F, *infra*, pp. 82-92. (After this appeal was docketed, new laws became effective which relate to some issues raised herein. The new statute, Calif. W. & I.C. § 11351.5, and proposed implementing regulations are set forth in Appendix G, *infra*, pp. 93-99. Discussion of the significance of the new laws is set forth in Appendix H, *infra*, pp. 100-104.)

Statement

Appellants are needy children who are applicants for, or recipients of, financial assistance under the Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*[2] Such AFDC grants are paid to meet the needs of dependent children who lack the income and resources necessary to secure a

[2] Other classes represented by named plaintiffs are needy welfare mothers, stepfathers married to welfare mothers but whose natural children are not eligible for welfare, and men who are determined to be assuming the role of spouse to welfare mothers.

basic subsistence. 42 U.S.C. §§ 602(a)(7) and 606(a). For a given needy family the California welfare department determines the cost of basic needs, such as food, shelter, clothing and medical care, according to set schedules.[4] From the need figure for an eligible family are deducted recurring income that is actually received, such as child support payments. The balance of needs not met by the

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[4] *See* Calif. W. & I.C. §§ 11450 *et seq.*

The welfare need standards established by the California welfare department have been held to be inadequate as a matter of law. ***Ivy v. Montgomery***, Civ. No. 592705 (San Fran. Co. Super. Ct., Calif., Sept. 11, 1969). The Findings of Fact include:

> 21. In establishing housing allowances, the SDSW [State Welfare Department] does not obtain any information regarding the quality or condition of housing and does not determine whether the housing upon which the samples are based meet the requirements of local and State housing codes.
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> • • •
>
> 23. The gap between the AFDC allowance for rent, and the minimum rents actually paid for safe, healthful housing, can only be met out of the subsistence amounts allowed for other living necessities such as food and clothing. For every rent dollar paid above the AFDC allowance, the recipient has one dollar less than she needs for the other needs of her family.
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> 24. Defendants Montgomery and the SDSW, in adopting the Cost Schedules, do not establish housing allowances in accordance with the local cost for housing as determined by the samples obtained from the counties.
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> • • •
>
> 45. The application of the 1967, 1968 and 1969 Cost Schedules in determining AFDC recipients' grants has resulted in irreparable injury, including malnutrition and ascertainable monetary loss among AFDC families.

The Court entered, *inter alia*, the following Conclusion of Law:

> 8. The AFDC Cost Schedules in California for the years 1967, 1968 and 1969, were adopted in violation of California Welfare and Institutions Code, Section 11452, in that the Cost Schedule housing allowances did not reflect the minimum amount necessary for AFDC recipients to obtain safe, healthful housing.

family's income will usually be the amount of the AFDC grant.[4]

California's welfare laws additionally require in the need determination process the consideration of the available income of a stepfather to the needy children, or of a man assuming the role of spouse (MARS) to their mother.[5]

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[4] However, when the family's needs exceed maximum grant levels established by Calif. W. & I.C. § 11450(a), aid will be granted only to the maximum ceiling. If eligible for AFDC benefits at the time the suits were filed, a mother and her four year old daughter, like plaintiffs Percy, would have received only $148 per month although they had no income and their needs under State welfare standards would have been $192. A three judge district court recently held invalid the California maximum grant statute. *Kaiser* v. *Montgomery*, Civ. No. 49613 (N.D. Cal., Aug. 28, 1969), ¶ 10391 CCH Pov. L. Rep., *juris. statement filed*, 38 U.S.L. Wk. 3185 (No. 828, Nov. 10, 1969). *See also Williams* v. *Dandridge*, 297 F.Supp. 450 (D. Md., 1968), *prob. juris. noted*, 38 U.S.L. Wk. 3127 (No. 131, Oct. 14, 1969) (legality of Maryland maximum grant scheme argued and submitted for decision on Dec. 9, 1969).

[5] At the time this action was commenced, Calif. W. & I.C. § 11351 imposed an apparent duty to support needy children on both a stepfather and a man assuming the role of spouse (MARS) to the children's mother. *See* Appendix D. (The statewide interpretive regulations are set forth in Appendices E and F.) Such a duty existed only in AFDC households; Calif. Civ. C. § 209 precludes a similar obligation in a nonwelfare situation.

Although § 11351 originally imposed such a duty on only the AFDC stepfather, the legislature added the MARS language to give express statutory authority to California's man-in-the-house rules following the sharp dissent of Justice Peters in *People* v. *Shirley*, 55 Cal.2d 521, 526, 360 P.2d 33, 36, 11 Cal. Rptr. 537, 540 (1961). *See* Report of the Senate Fact Finding Committee on Labor and Welfare, *Aid to Needy Children Program*, App. to J. of Sen. of Calif. (1961), v. 2, p. 66.

Both the wording of § 11351 and the opinions of the Justices of the California Supreme Court seem clearly to impose a support duty of some kind on a stepfather or MARS. While lower California courts have equivocated about the existence of any legal duty under § 11351 (*see, e.g., People* v. *Owens*, 231 Cal. App.2d 691, 697, 42 Cal. Rptr. 153, 157 (1965); *County of Kern* v. *Coley*,

The method for computing the amount of income available from a man in the house recognizes that the man has some obligations and personal needs that must be met. Those deductions which are permitted are, however, arbitrarily limited [A. 38-39] without regard to actual additional expenses of the man in the house. Moreover, the man's personal living needs are calculated at a welfare standard of existence* [A. 37 n. 3]. The operative result of the man-in-the-house budgetary rules is that the amount of income *actually* available from a man in the house is much less than the amount deemed available by the welfare department. Nevertheless, the rules conclusively presume that the needs of the children are reduced by the amount of

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229 Cal. App.2d 172, 177, 40 Cal. Rptr. 53, 56 (1964)), defendants claimed, and the court below held, that there was such a duty and that it was—for purposes of the instant case—equivalent in either a stepfather or MARS situation [A. 35, 45]. Plaintiffs assume arguendo that there is such a duty. The essential inquiry, however, is not whether a support duty exists but how the law affects needy children. The alleged support duty has been of little significance to such children because it has virtually never been enforced in the courts. *See* n. 39, *infra*, p. 33.

Effective November 10, 1969, the MARS language is deleted from § 11351, and a new statute (§ 11351.5) added. *See* Appendix G. The significance of the new statute is discussed in Appendix H.

* The determination of "available income" is particularly unreasonable in light of the fact that the man is assumed to meet his living costs at the wholly inadequate level of welfare budgets. *See* n. 3, *supra*. For example, a review of California standards concluded:

> The basis on which the Department has established housing allowances is unrelated to any evaluation of adequacy or decency, even in the most rudimentary term. The allowances are based on obsolete 1958 levels (and less than 100% of these!). Unlike other welfare budget items—food, clothing, drugs, utilities, etc.—rent allowances are not based on market research, or tied to quality standards. They are in effect mere fictions. [California State Social Welfare Board, *First Annual Report* (1965), at p. 50.]

income deemed available from the man in the house, regardless of whether such income is, in fact, available or actually used to meet the needs of the dependent children. The rules reduce and deny welfare grants of needy children in spite of actual need. Approximately 2800 AFDC families presently suffer grant reductions because of the conclusive presumption erected by California's man-in-the-house rules.[7] Plaintiffs, who present stepfather or MARS situations, are illustrative examples.[8]

Mrs. Lewis and her needy son and daughter were advised in October, 1968, by the defendant Alameda County Welfare Department (ACWD) that their welfare budget was about to be cut. Mrs. Lewis is divorced and her husband does not pay child support (even though he is under court order to do so). She had been receiving $175.00 per month from defendant ACWD, although the family has needs of $191.00.[9] The defendants advised Mrs. Lewis that her grant was to be reduced by $53.55 per month [A. 7], an amount irrebuttably presumed available to the family from Mr. Frank Watson, a man unrelated to the children, who had an informal relationship with Mrs. Lewis. Mr. Watson's take-home pay was $95.00 per week from his job as a maintenance man, and he was deeply in debt for cash loans and installment credit purchases incurred both before and after he met Mrs. Lewis. In fact, Mr. Watson did not

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[7] Lewis Record [hereinafter L.R.] 127. No data are available to reveal the number of families rendered wholly ineligible by the rules in question.

[8] Because plaintiffs' verified complaints were dismissed by the court below "for failure to state a claim upon which relief can be granted" [A. 49], the facts alleged therein must be taken as true for purposes of this appeal. Fed. R. Civ. Proc., Rule 8(d).

[9] *See* n. 4, *supra*, p. 7.

regularly make available to the Lewis children any part of his income, and Mrs. Lewis offered to prove this to the welfare department. The defendants, however, refused to consider any such evidence [A. 8-9].

Margaret Percy has a four year old daughter. Because the child's father had deserted the family, and because Mrs. Percy was unable to secure employment, she sought the assistance of a friend, Mr. Melvin Jones. Mr. Jones, burdened with extensive personal obligations and expenses, took Mrs. Percy and her child into his home, but was financially unable to provide them with more than shelter. Mrs. Percy sought the assistance of her local welfare department. Applying the man-in-the-house budgetary rule, the welfare department denied her assistance on the grounds that, because of Mr. Jones' presence in the household, his income was presumed irrebuttably to be "available" to Mrs. Percy's daughter. Mr. Jones was, in fact, not making his income available to Mrs. Percy or her daughter [A. 18; Percy Record (hereafter P.R.) 13, 49]. The department refused to consider that fact [A. 18].[10]

The circumstances of the plaintiffs who intervened in Civil No. 50285 [A. 35] further illustrate the effects of the budgetary rule upon needy children. In the case of the Bell family, the welfare department applied the rule

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[10] At the present time Margaret Percy and her daughter no longer reside in California. Because the man-in-the-house rules prevented Mrs. Percy from meeting the financial needs of her child, she became emotionally distraught and attempted suicide by slashing her wrists and throat. Following her recovery, she went to live with her parents out of the state and does not currently seek AFDC benefits in California. However, her claim for benefits wrongfully denied her during the period she resided in California remains to be resolved. *See Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969). And, of course, the change in her status does not affect that of the other named plaintiffs or the class she represented.

to assume that Mr. Bell could live on a welfare level of subsistence, thereby making the rest of his income "available" to his five stepchildren. As a result, a hitherto stable marriage broke up because the family was unable to cope with its financial burdens. Mr. and Mrs. Bell separated, leaving Mrs. Bell alone with six children, one of whom was the issue of the marriage. Welfare assistance was then granted for all six children [A. 26-27].

The Sims family was also broken up because of the rule. Mrs. Sims was left with the four stepchildren [P.R. 56]. In the Garner household, only Mrs. Garner's four children received AFDC. The child born to Mrs. Garner and the MARS was ineligible for any benefits because not deprived of parental support. However, when the welfare department calculated how much of the man's income was required to support his natural child, that child was presumed to exist at a welfare subsistence level [P.R. 90].

Because of the effects of California's man-in-the-house laws, plaintiffs instituted class actions pursuant to Rule 23(b), Fed. R. Civ. Proc., for injunctive and declaratory relief on various constitutional and statutory grounds. Their primary contentions were that (1) the California statute and regulations are contrary to the Social Security Act and to regulations promulgated by the Department of Health, Education and Welfare (HEW), in particular 45 C.F.R. § 203.1; (2) the state laws deny due process contrary to the Fifth and Fourteenth Amendments of the United States Constitution because the conclusive presumption they create is not rationally supported; and (3) the state laws contravene the equal protection clause of the Fourteenth Amendment because they classify needy children according to the presence or absence of a rela-

tionship between their mother and a man in the house, a factor not reasonably related to the purposes of the AFDC program.

On October 31, 1968, the district court found that Mrs. Lewis and her children (plaintiffs in Civil No. 50238) were suffering irreparable injury because of the impending grant reduction, and issued an order temporarily restraining it [L.R. 23]. On application for a preliminary injunction on November 12, 1968, the order was dissolved. The case was set for consolidated hearing with Civil No. 50285 before a three judge panel, which rejected the claims of plaintiffs, finding the HEW regulation—rather than the California rule—"inconsistent with the language and policy of the Social Security Act" [A. 49], and granted defendants' motion to dismiss [A. 49].[11] Plaintiffs filed a timely motion

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[11] The court below held:

> [Section 11351] obligates the MARS [and the stepfather] to support the children in the home to the extent he is able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression [sic] mandate, are, in the view of this court, invalid. [A. 39-40; emphasis in original.]

However, a three judge district court in Connecticut upheld the same regulation under § 602(a)(7), and this Court affirmed that decision. *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn., 1968), *aff'd per curiam*, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

(footnote continued on next page)

to vacate and motion for rehearing [A. 50], which was denied. Thereafter plaintiffs filed this appeal.

Summary of Argument

Protection of needy, dependent children is the paramount concern of the Aid to Families with Dependent Children program (AFDC). *King* v. *Smith*, 392 U.S. 309, 325 (1968). The Supreme Court in *King* held that states could not legally deny AFDC benefits to needy children on the basis of a conclusive presumption that a man having a sexual relationship with the children's mother, but not legally obligated to support those children, will provide the economic protection contemplated by the Social Security Act. *Id.* at 333. The Court also approved in *King* the long-standing nonassumption of income regulations of the Department of Health, Education and Welfare (HEW). *Id.* at 319 n. 16.

At least twelve states had man-in-the-house budgetary rules when *King* v. *Smith*, 392 U.S. 309 (1968) was decided. Pollack, Comment, *Man-in-the-house Rules After King* v. *Smith: New HEW Regulations*, 14 Welf. L. Bull. 19, 20 (Sept., 1968). Some of those rules were abandoned or overturned subsequent to the promulgation of the HEW regulation. *See, e.g., Grubb* v. *Kelly*, Civ. No. 69F3 (N.D. Ind., March 17, 1969), ¶ 9555 CCH Pov. L. Rep. (stipulation entered for amendment of Indiana stepfather regulations to conform with 45 C.F.R. § 203.1); *In re Byrdsoll*, ¶ 9193 CCH Pov. L. Rep. (Penn. Off. Pub. Assist.; regulations alleged inconsistent with 45 C.F.R. § 203.1 were deleted on Feb. 11, 1969 (16 Welf. L. Bull. 6, March 1969)); *Machado* v. *Hackney*, Civ. No. 68-108-SA (W.D. Tex., May 12, 1969) (Texas substitute father rule held invalid under *King* v. *Smith*, *supra*). In other jurisdictions litigation continues over man-in-the-house rules. *See, e.g., Abbs* v. *Graham*, Civ. No. 69-156 (D. Ariz., filed July 29, 1969), ¶ 10,273 CCH Pov. L. Rep.; *Mitchell* v. *Dept. of Pub. Welf.*, No. 655763 (Hennepin Co. Dist. Ct., Michigan), ¶ 9778 CCH Pov. L. Rep.; *Montes* v. *Wyman*, Civ. No. 69 Civ. 4773 (S.D.N.Y., filed Oct. 27, 1969), ¶ 10,677 CCH Pov. L. Rep. *See also Tartaglio* v. *Dept. of Inst. and Agen.*, 102 N.J. Super. 592, 246 A.2d 483 (N.J. Super. Ct., App. Div., 1968), *cert. den.*, 394 U.S. 1000 (1969).

In the wake of the *King* decision, HEW promulgated a regulation incorporating that holding and reaffirming the prohibition on assumption of income. The regulation, 45 C.F.R. § 203.1, states that, for purposes of determining a child's eligibility for federal AFDC assistance, the income of a man not ceremonially married to the mother of such children may not be treated as available to the family unless there is proof that he has made actual contributions. The regulation further prohibits a state from conclusively presuming the availability of income from a man who, although ceremonially married to the mother, is not the real or adoptive father of the children and is not legally obligated to support the children to the same extent as a real father, and who is not actually contributing such support. The HEW regulation does not violate the statutory command to "take into consideration any other income and resources of any child or relative claiming aid . . . ," 42 U.S.C. § 602(a)(7); it merely prohibits the assumption of income not actually available to the child. The regulation is valid because it reasonably interprets the terms of the statute and is consistent with the principles expounded by this Court in *King* v. *Smith, supra.*

California's welfare laws establish an irrebuttable presumption that a stepfather or "man assuming the role of spouse" (MARS) to the mother of needy children contributes all of his available income to them. Calif. W. & I.C. § 11351 imposes an apparent duty of support on a man in the house. Such a duty, existing only in welfare households, is not enforced in fact and is ill-suited to ensure meaningful economic protection for needy children. The man-in-the-house budgetary rules, nevertheless, mandate

he reduction, termination and denial of AFDC grants for eedy families with a stepfather or MARS, offering the urported support obligation in lieu of financial welfare ssistance. No amount of proof—no matter however posi- ve—is permitted to rebut the conclusive presumption that eedy children, whose mothers have a marital or sexual elationship with a man in the house, have available to hem and receive the use of the man's income.

California's man-in-the-house rules plainly conflict with he HEW regulation. The State of California has conceded his fact, and the court below so held. Because the regula- on comports with the Social Security Act and *King* v. *mith, supra,* the state rules are invalid. Moreover, the onclusive presumption denies needy children a fair oppor- unity to establish needs which clearly exist—despite the tate's contrary assumption—and, thereby, violates due rocess. Finally, the classification of otherwise identically ituated needy children, so as to deny federal AFDC bene- ts to the children of the disfavored class, whose mothers ave a sexual or marital relationship with a paramour or stepfather, has no reasonable nexus to the purposes of he AFDC program.

Congress did not create the Social Security Act in order o protect and extend economic security to arbitrarily se- ected dependent children while simultaneously offering ther children irrebuttable presumptions rather than food, lothing, shelter and medical attention. Neither did Con- ress seek to destroy family relationships. Yet that is the roduct of California's man-in-the-house laws. Because de- tructive of the purposes of the AFDC legislation and con- rary to constitutional requirements and to the Social

Security Act, as interpreted by this Court and implemented by HEW, such budgetary rules are accordingly invalid under the Act and under the Constitution of the United States.

ARGUMENT

I.

California's Man-in-the-House Laws Violate the Social Security Act and HEW Regulations, and Are Therefore Invalid.

A. The Social Security Act and HEW Regulations Promulgated Thereunder Preclude Welfare Grant Reductions Based on Assumptions of Availability of Income.

The Social Security Act implements a scheme of "cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participating states receive substantial federal funds on a matching basis, and their plans must, therefore, conform with provisions of the Social Security Act and with rules and regulations promulgated by the Secretary of Health, Education and Welfare (HEW). *Id.* at 316.[12] One of the categorical public assistance programs created by the Act is Aid to Families with Dependent Children

[12] Under the Supremacy Clause, Art. VI, cl. 2, of the United States Constitution, federal legislation is controlling: "a State is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies." *United States* v. *Georgia Public Services Comm'n*, 371 U.S. 285, 293 (1963). A federal regulation implementing a valid congressional act is also controlling. *Free* v. *Bland*, 369 U.S. 663, 668 (1962).

(AFDC). 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 601 *et seq.*

The AFDC program, as interpreted by this Court in *King* v. *Smith*, *supra* at 325, has as its primary purpose and paramount concern the protection of needy children from economic insecurity. The language of § 401 of the Act, 49 Stat. 629 (1935), as amended, 42 U.S.C. § 601, states that the AFDC program seeks

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

Consistent with this paramount objective, the Secretary of HEW has the initial authority under the Act to interpret and implement the statutory provisions. 42 U.S.C. §§ 602(a)(6) and 1302.[13] Pursuant to 42 U.S.C. §§ 601 and 602, the Secretary must establish requirements for State plans seeking to receive federal matching funds for their AFDC programs. Congress specifically mandated the Secretary to require the State agency in determining need to "take into consideration any other income and resources of any child" seeking AFDC benefits. 42 U.S.C. § 602(a)

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[13] 42 U.S.C. § 1302 provides:

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

See also Note, *Welfare's "Condition X"*, 76 Yale L.J. 1222 (1967).

(7).[14] The Secretary of HEW has interpreted and im
mented § 602(a)(7) by a series of regulations setting f
the manner in which income and resources may be
sidered by the State agency while safeguarding the n
children from economic insecurity and promoting the
mary purpose of the Act. HEW *Handbook of Public*
sistance Administration (hereafter HEW *Handbook*),
IV, §§ 3120 *et seq.*; 45 C.F.R. § 203.1 (33 Fed. Reg. 1
August 8, 1968). The recurrent theme of these regulat
is that only income and resources actually received an
fact available are to be considered in determining need
the amount of welfare assistance to be paid a needy
vidual. HEW has expressly ordered states to "[e
from consideration . . . any income or resources *no*
assumed to be possessed by the individual." HEW *H*
book, Pt. IV, § 3120 (emphasis supplied). Example
income which must not be considered when it is not actu
and currently available to the needy individual inclu

> support payments ordered by the court but which
> not, in fact, made; contributions which relatives
> been determined able to make but which are no
> fact, made; and income from employment assume
> be available in the community when, in fact, the
> vidual is not working. [HEW *Handbook*, Pt.
> § 3120.]

Since July 1, 1967, HEW has explicitly *required* th

> the State plan must provide that *only* income and
> sources that are, in fact, available to an applican

[14] Section 602(a)(7) was amended by *Congress* in 1968. 81
881. The text of the section appears in Appendix A. *The dec*
of the court below rested on the language of § 602(a)(7) *pri*
the amendment [A. 35], although it made no significant chang
the law. *See infra*, p. 28.

> recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment. [HEW *Handbook*, Pt. IV, § 3131 (7).][11]"

The Supreme Court noted that the HEW regulations prohibiting the assumption of income to needy individuals "clearly comport" with the Social Security Act in *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

Following the express approval of its regulations by the Supreme Court, HEW promulgated 45 C.F.R. § 203.1 (hereafter the HEW regulation) refining its income availability regulations consistent with the Court's decision to invalidate substitute parent rules in *King* v. *Smith*. The new regulation provides in part:

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[11] Section 3131(7) was originally promulgated by HEW as Handbook Transmittal No. 86 (July 6, 1966). The covering letter with the transmittal noted that no new policies were being implemented. Subsequent to the appearance of Transmittal No. 86, a lawsuit was commenced challenging California's assumption of income policies. *McPherson* v. *California*, Civ. No. 46759 (N.D. Cal., June 29, 1967). Defendants in *McPherson* moved to dismiss the complaint because of the adoption by the State Department of Social Welfare of a new regulation (now Calif. *MPP*, § 44-101) that provided in part: "To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family . . . ." (The section as it presently exists appears in Appendix B, *infra*, p. 76.) The defendants conceded "[t]he reasonableness of plaintiffs' complaint on this issue [of income assumption]" in their Memorandum in Support of Motion to Vacate Order Convening Three Judge Court, set forth in part at L.R. 182. *See also* A. 51. On that basis, the three judge court ordered the action dismissed on June 29, 1967. In spite of their acceptance of § 3131(7) in *McPherson*, appellees have continued to apply rules, such as the man-in-the-house rules, that require assumption of income regardless of its actual nonavailability. *See* L.R. 127, 134-155. And appellees do so in the face of their own regulation to the contrary, Calif. *MPP* § 44-101.

(a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.[16]

[16] Subsection (b) of 45 C.F.R. § 203.1 incorporates by reference certain items from Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968). The policy issuance required State plans for categorical aid programs, such as AFDC, to, *inter alia*:

ordingly, the established and long-standing policy of ress and the Department of Health, Education and are has been that income and resources are not to be ned available to needy persons in the absence of proof fact availability. In the case at bar, California's man-house rules are clearly contrary to the Social Security nd federal regulations because they require the wel-agency to assume that income of a man in the house ailable to needy children, whose mother resides with an, even though such income is, in fact, *not* available. ffect is that the needy children suffer grant reductions

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3.C.2. Provide that, in establishing financial eligibility and the amount of the assistance payment:

(i) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs;

• • •

(iii) *Only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered;*

• • •

6. If the State agency holds relatives responsible for the support of applicants and recipients,

• • •

(ii) Provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21. [Emphasis supplied.]

EW noted that the purpose of the policy issuance was to up- and simplify Part IV of the HEW *Handbook*, §§ 3000 to 3200, to implement the 1967 Social Security Amendments, including 2(a)(7) [42 U.S.C. § 602(a)(7)]. 33 F.R. 10230 (July 17,).

although they do not receive any equivalent financial assistance or meaningful economic security from the man in the house. California contends, and the court below held [A. 39] that the HEW regulation is invalid, as inconsistent with the mandate of 42 U.S.C. § 602(a)(7). The AFDC families adversely affected by California's assumption of income rules submit that the Social Security Act and this Court's decision in *King* v. *Smith* make necessary and proper the HEW regulation in order to safeguard the rights of needy children.[17]

There is no dispute that, if valid, the HEW regulation precludes a man-in-the-house budgetary rule such as that existing under California law. Defendants have expressly conceded the plain conflict of the California man-in-the-house rules with the HEW regulation. L.R. 71, 79. The court below held that the state rules are clearly contrary to the HEW regulation [A. 35-39].

B. The HEW Regulation Is Valid as a Reasonable Implementation of the Social Security Act and the Decision of This Court in *King* v. *Smith*.

In determining the validity of a regulation of a federal administrative agency, such as HEW, the function of the court is to enquire only whether the regulation is "in conflict with express statutory provision" [18] and "unreasonable

[17] A three judge court of the United States District Court for the District of Connecticut has applied the HEW regulation to overturn Connecticut's version of a man-in-the-house budgetary rule. *Solman* v. *Shapiro*, 300 F.Supp. 409, 416 (1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

[18] *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349 (1920).

and plainly inconsistent with" the statutory purpose,[19] and whether "weighty reasons" exist for overruling it.[20] Otherwise, a regulation promulgated under the rule-making authority of a federal administrative agency has "the force and effect of law."[21]

The HEW regulation in question has two principal facets. One (45 C.F.R. § 203.1(a))[22] defines the meaning of "parent" under the AFDC provisions of the Act; the other (45 C.F.R. § 203.1(b))[23] prohibits the states from as-

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[19] *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931).

[20] *Commissioner* v. *Estate of Sternberger*, 348 U.S. 187, 199 (1955); *Billings* v. *Truesdell*, 321 U.S. 542, 552 (1944); *Brewster* v. *Gage*, 280 U.S. 327, 336 (1930).

[21] *Paul* v. *United States*, 371 U.S. 245, 255 (1963); *United States* v. *Mersky*, 361 U.S. 431, 437 (1960); *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542 (1958); *Shaughnessy* v. *United States ex rel. Accardi*, 347 U.S. 260, 265 (1954), 349 U.S. 280, 285 (1955); *see also* Note, *Federal Judicial Review of State Welfare Practices*, 67 Colum. L. Rev. 84, 110-111 (1967).

[22] Section 203.1(a) provides in part:

> A State [AFDC] plan . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

[23] Section 203.1(b) provides in part:

> The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . . [I]n

suming the availability of income from a person other than a parent as defined by the regulation. The former provision is a codification by HEW of this Court's holding in *King* v. *Smith*, 392 U.S. 309 (1968).[24] The latter refines the long-standing HEW policy on nonassumption of income consistent with the interpretation given the Act by the *King* decision.[25] Notwithstanding the contention of defendants

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> the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

[24] Alanson Willcox, General Counsel of HEW, has explained [A. 58 n. 3] the HEW regulation in part as follows:

> The reasoning of the opinion [in *King* v. *Smith*] clearly supports the further restriction that the State law imposing such an obligation must be of general applicability and impose the same obligation as is borne by the natural parents. To permit a special lesser duty to be established for stepfathers or other substitute fathers of children on public assistance (or children who are poor) would be an obvious circumvention of the law as interpreted by the Supreme Court.

[25] Prior to *King*, HEW had done little to enforce its prohibition on assumption of income rules against state man-in-the-house laws. Such arguably implicit approval does nothing, of course, to legitimize those laws when contrary to the controlling statute. *King* v. *Smith*, 392 U.S. 309, 333 n. 34 (1968). The reason for HEW's prior inaction was offered by its General Counsel [A. 57-58] as follows:

> Prior to the decision of the U.S. Supreme Court in *King* v. *Smith*, the [nonassumption of income] regulations were applied in the light of State "substitute father" rules. Some States with such rules made children totally ineligible because of a stepfather or other substitute father, while other States with such rules assumed the income of the substitute father and allowed the family to be eligible for needs beyond that income. Such assumption of income was tolerated by the Federal agency, even though otherwise contrary to the Federal regulation, only because it was viewed as the application of a sub-

and the holding of the court below,[35] the HEW regulation unquestionably is consistent with the congressional mandate of the Social Security Act.

1. The HEW Regulation Is Not in Conflict With Any Express Statutory Provision of the Act.

Section 402(a)(7) of the Social Security Act, 53 Stat. 1379 (1939), as amended, 42 U.S.C. § 602(a)(7), declares that the State agency "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." The Social Security Act is silent on the question of whether income may be *assumed* to be available to a needy child from one who is not a natural or adoptive parent, or the spouse of such parent. Indeed, there is no clear in-

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stitute father rule, albeit one which did not automatically make the family completely ineligible for AFDC.

When the decision in *King* invalidated State substitute father rules, there was no basis for the Federal agency to apply its regulations relating to non-assumption of income in any way other than as written. It should be particularly noted that the Supreme Court was mindful of these regulations and stated that they "clearly comport with the statute." 88 S. Ct. 2128, 2134, n. 16 (1968).

[35] The Court below declared [A. 39]:

Plaintiffs contend that the HEW regulation must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations, to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

dication in the statutory language that Congress intended to authorize imputation of income to needy children under any circumstances. Section 602(a)(7) appears reasonably on its face to refer only to the consideration of income *actually* available to the needy child. The long-standing interpretation by HEW to that effect has been held by the Supreme Court to "clearly comport" with the Act. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

The phrase "child or relative claiming aid" in § 602(a)(7) cannot be said to conflict with HEW's requirement that a State may consider only income in fact available from a man in the house. For that language clearly requires the "relative" to *claim* aid.[17] The men from whom income was considered available to the needy children in this case did not seek AFDC aid, nor were they entitled to such benefits under California welfare law.[18]

The 1968 amendment to § 602(a)(7) added language which California urged as a blanket authorization for states to assume income in a man-in-the-house situation.[19] L.R. 80;

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[17] The three judge court in *Solman* v. *Shapiro*, 300 F.Supp. 409, 415 (D. Conn., 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969), noted that a stepfather residing with needy children is not a "relative claiming aid."

[18] Calif. *MPP* §§ 44-213.21 and 213.31 provide that persons excluded from an AFDC budget unit are "[a]n unrelated male over the age of 18 living in the home who is not married to the mother and has no children in common with her" and "[t]he stepfather, the mother, and the stepfather's children of another relationship living in the home, when his *separate* income meets their needs" [emphasis in original]. Indeed, under California law a person "other than a needy child, who willfully and knowingly receives or uses any part of an [AFDC] aid grant . . . for a purpose other than support of the needy children and the caretaker involved, is guilty of a misdemeanor." Calif. W. & I.C. § 11480.

[19] The court below, however, relied only upon the statutory language prior to the 1968 amendment [A. 35].

P.R. 133. As amended, 81 Stat. 881, the section provides in relevant part (amendment underscored):

> [The state welfare agency] shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . .

In *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L.Wk. 3125 (No. 215, Oct. 14, 1969), the State of Connecticut and its welfare agency had similarly relied upon the 1968 amendment to justify the Connecticut man-in-the-house rule. The three judge court in *Solman* disagreed with their contention. 300 F.Supp. at 414. The court noted that the new language had "a special meaning" and that its purpose was to codify the HEW "essential person" rule which permits a state "to establish the need of the individual on a basis that recognizes as essential to him the presence in the home of other needy persons. . . . " HEW *Handbook*, Pt. IV, § 3131(4).[20]

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[20] Under the essential person doctrine a needy person has the right to elect to include in the family budget unit persons who are not otherwise eligible when their presence in the home is essential to the recipient. An example of an "essential person" is the wife of a man who is eligible for old-age assistance. Obviously, the wife's continued presence in the home is essential to the recipient's well-being. Her needs could therefore be included in the grant and her income and resources considered.

The state cannot insist that a nonrecipient be deemed an essential person. HEW *Handbook*, Pt. IV, § 3131(4). *See Solman* v. *Shapiro*, *supra* at 415. Thus, even if the language added to § 602 (a)(7) permits assumption of income from an essential person, such an assumption is improper when the recipient has not elected

Solman v. *Shapiro, supra* at 414. HEW has also stated that the added language in § 602(a)(7) related only to its essential person doctrine.[31] And this view of the meaning of the 1968 amendment is consistent with its legislative history. According to the Report of the Committee on Ways and Means, in which the amendment originated, the new language in 42 U.S.C. § 602(a)(7) "makes no change in present law." H.R. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967).

Scrutiny of § 602(a)(7), even as amended by Congress in 1968, provides no basis upon which to hold the HEW regulation involved in the case at bar in conflict with the *express* statutory language of the Social Security Act.

2. The HEW Regulation Comports With the Purposes of the Social Security Act and the Decision of This Court in *King* v. *Smith*.

The HEW regulation was promulgated under the broad rule-making powers of the Secretary[32] in order to imple-

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to claim the person to be essential. The recipients in *Solman* had not designated the stepfather to be essential. *Id.* The California welfare agency does not recognize a MARS as an essential person, and a stepfather may qualify only under limited circumstances. *See* n. 28, *supra*, p. 26. And, as in *Solman*, none of the plaintiffs in the case at bar have claimed the man in the house as an essential person.

[31] A. 54-55 (Letter of Alanson Willcox, General Counsel of HEW).

[32] *See* n. 12, *supra* p. 16. This Court has earlier recognized the expansive powers delegated to the Secretary of HEW under the Social Security Act. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277 n. 28 (1969) (dictum). Other federal courts have so found. *See, e.g., Worrell* v. *Sterrett*, Civ. No. 69F33 (N.D. Ind., Oct. 15, 1969), ¶ 10,575 CCH Pov. L. Rep.

ment 42 U.S.C. §§ 602 and 1302. 33 Fed. Reg. 11290 (August 8, 1968). Appellants submit that the HEW regulation is a reasonable implementation of the purposes of the Social Security Act.

(a) *The HEW Regulation Ensures the Economic Security of Needy Children.*

The paramount concern of Congress in enacting the Aid to Families with Dependent Children (AFDC) program was the protection of needy, dependent children. *King* v. *Smith*, 392 U.S. 309, 325 (1968). In *King*, the Supreme Court reviewed one version of a man-in-the-house rule, Alabama's "substitute father" law, which denied AFDC assistance to needy children whose mother maintained a relationship with an unrelated male. *Id.* at 314. The Alabama law assumed that a man having a sexual relationship with the mother of needy children was a "parent" in the sense of the Act, so that children having such a "substitute father" were not deemed to be deprived of parental support. *Id.* at 327.

Expressing its disapproval of a state plan under which "the actual financial situation of the family is irrelevant," *id.* at 320, the Court ruled that the Social Security Act precludes the disqualification of needy children from AFDC on the arbitrary basis of a conclusive presumption that a man not legally obligated to support the family was in fact doing so. The facts in *King* did not require the Court to consider "budgetary" man-in-the-house rules, such as those challenged herein, which purport to govern need determinations as opposed to eligibility. However, as was the case of the rules held invalid in *King*, the California rules ignore "the actual financial situation of the family"

in favor of the conclusive presumption that a man residing in a welfare household will contribute his available income to the needy children. The California man-in-the-house rules permit no inquiry to determine how much income is *in fact* available to the children. No regard is paid to the fact that the supposed support duty, which exists only in welfare families, is defeasible by the man's mere removal from the home. Nor does the welfare department seek to enforce the obligation. Rather, the rules operate to decrease and deny welfare grants on the conclusive presumption that needy children can secure basic subsistence needs with theoretical rights in lieu of federal categorical assistance. The principles enunciated by this Court support the validity of the HEW regulation that would preclude California's version of a man-in-the-house rule.

The Court noted that the Alabama law was inconsistent with congressional intent because it did not "provide adequate economic protection for a dependent child," *King* v. *Smith*, 392 U.S. 309, 332 (1968), or "provide meaningful economic security for [the] child," *id.*, at 330, thus leaving "one class of destitute children entirely without meaningful protection," *id.* at 330. The HEW regulation attempts to ensure that needy children will have "meaningful economic security" by prohibiting the states from denying AFDC benefits to children who have no "natural or adoptive parent" or "stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. § 203.1 (a). Such a limitation on who may be deemed a parent

guarantees that the child will have meaningful protection. Natural or adoptive parents are traditionally held responsible to support their children. *See, e.g.*, Calif. Civ. C. §§ 241 *et seq.* Moreover, that support obligation is meaningful because it is enforced by both criminal[33] and civil[34] sanctions. The HEW regulation also recognizes that a stepparent under a support obligation equivalent to that imposed upon natural or adoptive parents may be deemed a parent without denying needy children the meaningful economic protection envisioned by Congress.

The HEW regulation does not permit the state to assume that a man, who merely resides with the family and has a sexual relationship with the mother, or a stepfather, who is not under a generally applicable support duty equivalent to that imposed upon natural or adoptive parents, is a parent. Common-law relationships between adults do not in general experience afford needy children sufficient economic security to warrant a conclusive presumption that they are supported either wholly or in part by the man in the house.[35] The unstable nature of a man-in-

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[33] Calif. Pen. C. § 270.

[34] Calif. Civ. C. §§ 241 *et seq.* (Uniform Civil Liability for Support Act). Child support orders are enforcible by remedies including the following: contempt proceedings (Calif. C.C.P. § 1209); execution against property (C.C.P. § 688); and garnishment (C.C.P. § 543). Also available are court procedures to secure support from a parent residing in another state. Calif. C.C.P. §§ 1650 *et seq.* (Uniform Reciprocal Enforcement of Support Act).

[35] The foremost commentators on the relative merits of Calif. W. & I.C. § 11351, Professor tenBroek and Professors Lewis and Levy, are—in spite of their numerous differences—in accord on one aspect of the California statute: it is *not* reasonable to infer that a man assuming the role of spouse will contribute to the support of the mother and her needy child, the opinion of the California

the-house relationship, especially in light of the financial burdens on the family, underscores its inadequacy as a guarantee of meaningful economic security for needy children.[36] Moreover, California law imposes the obligation on a stepfather *only* during the time that he resides with the needy children.[37]

In *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L.Wk. 3125 (No. 215, Oct. 14, 1969), a three judge district court held invalid a Connecticut statute requiring the consideration of the stepparent's available income and ability to support a needy child in determining that child's need for AFDC

Supreme Court in *People* v. *Shirley*, 55 Cal.2d 521, 529, 360 P.2d 33, 38, 11 Cal. Rptr. 537, 542 (1961), notwithstanding. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (Pt. III), 17 Stan. L. Rev. 614, 658 n. 999 (1965); Lewis and Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 779 (1966).

[36] Section 11351 formerly provided: "Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse . . . ." The statewide regulations implementing the law deem the respective relationships to exist only as long as the stepfather resides with his wife and her needy children (Calif. *MPP* § 42-513.54) or the MARS is "in or around the home and is maintaining an intimate relationship with the mother" (Calif. *MPP* § 42-515.411) *and* he either assumes financial responsibility for the needy family *or* holds himself out to the community as husband or father or both (Calif. *MPP* §§ 42-515.412 and 515.413). *See* Appendices E and F.

The new MARS law, § 11351.5, retains the same standard: "Whenever an unrelated adult male *resides* with a family applying for or receiving [AFDC] . . ., he shall be required to make a financial contribution to the family . . ." (emphasis supplied). *See* Appendices G and H.

[37] The stepfather, once he leaves the welfare home, is no longer obligated to support his stepchildren under Calif. Civ. C. § 209. *See infra* p. 33.

benefits. The court in *Solman* noted that the state law was not one "of general applicability imposing an obligation on a stepfather to support his minor stepchildren," as required by *King* v. *Smith*, 392 U.S. 309, 329 (1968), and that it therefore "squarely contravenes the [HEW] regulation." *Solman* v. *Shapiro, supra* at 414. The generally applicable support law in Connecticut imposes no support duty on stepfathers, and none is recognized in Connecticut's common law. *Id.* California similarly has no generally applicable support law obligating stepfathers and men "assuming the role of spouse" to support the children in their household. In fact, Calif. Civ. C., § 209, explicitly denies that such a duty exists unless the stepfather stands in loco parentis to the stepchild. Section 209 provides in part that "[a] husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent. . . . " California does, however, impose a limited support duty on a man residing with an AFDC family, without regard to whether the man in the house supports the needy children or "receives them into his family." [38] Calif. W. & I.C. §§ 11351 and 11351.5.

The effect of the California man-in-the-house law is to reduce and deny AFDC assistance to needy children in spite of the fact that no meaningful economic protection is actually afforded by the mere existence of a conclusive presumption.[39] Thus, in the case of the Lewis family, the

[38] *See* ns. 36 and 37, *supra*.

[39] Indeed, the California practice is to decrease welfare grants for needy children with a man in the house regardless of the fact that his income is not actually available, or to prosecute for grand theft and welfare fraud those mothers who are "overpaid" under the budgetary rules of § 11351 because they fail to report the presence

children received approximately $55 less AFDC assistance because the man in the house was presumed to be contributing that amount [A. 7]. The welfare department admitted that the reduction was made in spite of the absence in fact of such contribution from the man in the house. L.R. 125. And the welfare department stipulated that the HEW regulation would preclude such a grant reduction. L.R. 128. It is precisely this form of a budgetary man-in-the-house rule that HEW sought to eliminate subsequent to *King* v. *Smith*,

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of a stepfather or MARS. *See, e.g., People* v. *Shirley*, 55 Cal.2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961); *People* v. *Flores*, 197 Cal. App.2d 611, 17 Cal. Rptr. 382 (1961); *People* v. *Ford*, 236 Cal. App.2d 438, 46 Cal. Rptr. 144, *appeal dismissed*, 384 U.S. 100 (1965). When such an "overpayment" is made, the welfare department further reduces—or even cuts off entirely—welfare grants in order to collect the "overpayment." Calif. *MPP* §§ 44-333 and 335; *see Stallworth* v. *California*, Civ. No. 48393 (N.D. Cal., voluntarily dismissed on Nov. 12, 1969, subsequent to promulgation of new regulations). California's method of enforcing § 11351 can hardly be held to benefit needy children who need food and clothing, not irrebuttable presumptions.

And California county welfare departments have virtually never sought enforcement of the man-in-the-house obligation through criminal or civil prosecutions. (However, an unemployed MARS may be prosecuted for misuse of welfare funds under Calif. W. & I.C. § 11480. *See* n. 28, *supra*, p. 26.) In a preliminary study conducted by the Yale Law Journal in March, 1969, the ten California counties with the largest welfare populations indicated it was *not* their practice to enforce § 11351 against the MARS and for the benefit of the needy children by use of court action. Several of the respondents volunteered that enforcement of the obligation was achieved through welfare fraud prosecutions. Rosen, *Enforcement of California's Man Assuming the Role of Spouse Statute: Empirical Findings* (May, 1969) (printed in Sparer, *Materials on Public Assistance Law*, Univ. of Penn. L. Sch., Reginald Heber Smith Community Lawyer Fellowship Program (unpublished, Summer, 1969), v. 1, pp. 5-132 to 5-143). Further survey efforts secured responses from district attorneys and welfare departments in over forty counties and established that nonenforcement of the § 11351 support obligation against a man in the house was virtually universal. (Survey responses are on file in the office of the Yale Law Journal and in the Yale Law School Library.)

392 U.S. 309 (1968), correctly perceiving that a failure to prohibit income assumption rules in man-in-the-house cases would circumvent the *King* decision.[40]

Subsection (b) of the HEW regulation specifically implements such a nonassumption standard, a principle embraced by this Court in expressly approving HEW rules which prohibit the assumption of income from relatives who have a legal duty of support or who may, indeed, be under a court order to supply such support. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).[41] In fact the Court spoke approvingly of the predecessor of the HEW regulation here involved, indicating that income presumptions are disfavored. *Id.* The Supreme Court observed that regular and actual contributions are, of course, properly considered in determining need. However, in interpreting the words "other income and resources" the Court reached a conclusion very different from that arrived at by the court below in the case at bar.

> Indeed, the Act requires that in determining need the state agency "shall . . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." 42 U.S.C. § 602(a)(7). Regulations of HEW, which

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[40] *See* n. 24, *supra*, p. 24.

[41] HEW explains the application of the nonassumption rule to situations when there is a legal obligation or a court has ordered support payments, as follows:

> [I]n reviewing actual practice, it has been found that most support payments in AFDC are irregular. . . . Reduced assistance payments based on assumed receipt of support payments or any other income that is not, in fact, available, are inconsistent with the welfare agency's responsibility for meeting need and strengthening family life. They result in inequity in meeting the continuing needs of the family affected. [HEW *Handbook*, Pt. IV, § 3124.]

> clearly comport with the statute, restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis. . . . This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual. Handbook, Pt. IV, § 3131(7). See also §§ 3120, 3123, 3124, 3131(10), and 3131(11)." [392 U.S. at 319 n. 16]

By emphasizing that only actual and regular contributions assure needy children of meaningful economic protection, the Court implicitly acknowledged that the paramount purpose of Congress—to give economic security to such children—would not be afforded by a state's reliance upon an ephemeral legal duty of support, when the only practical effect and importance of that duty is to justify an irrebuttable presumption of availability of income. It is axiomatic that a man does not become a father—or as this Court said in *King* v. *Smith*, a "breadwinner"—simply because of the state's conclusive presumption that he is one. In light of *King*, HEW has properly acted to preclude any form of substitute father or man-in-the-house rules which fail to conform with the paramount purpose of the AFDC program.

(b) *The HEW Regulation Implements the Statutory Requirement of the Affirmative Pursuit of Resources Through Court Proceedings.*

Congress recently expressed its intention that local welfare agencies, when faced with situations in which persons

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[42] The regulations cited are set forth in Appendix C.

legally obligated to support children fail to do so, should employ state court procedures to secure such support. For example, under 42 U.S.C. § 602(a)(17), 81 Stat. 878 (1968), the State agency must assist an AFDC child who is born out of wedlock in establishing paternity and securing support, and the agency must assist an AFDC child who has been deserted or abandoned by his parent in securing support from such parent and in utilizing interstate arrangements to obtain or enforce court orders for support.[48] *See also* 42 U.S.C. §§ 602(a)(16), (18), (21) and (22), 81 Stat. 878-9, 896-7 (1968). The legislative history of these amendments underscores the congressional emphasis on an increased utilization of law enforcement resources. S. Rep. No. 744, 90th Cong., 1st Sess. 160-63 (1967).

In *King* v. *Smith*, 392 U.S. 309, 332 (1968), this Court concluded from the clear pattern of the AFDC legislation that Congress intended that the State agency would "secure parental support *in lieu of* AFDC support for dependent children" (emphasis supplied). Of course, "[s]uch parental support can be secured only where the parent is under a state-imposed legal duty to support the child"; if there is no such duty, needy children are left entirely without the meaningful economic protection intended by Congress. *Id.* The Court further noted that "parent" as used by Congress must encompass only those persons who are legally obligated to support a dependent child. *Id.* at 327. Otherwise, the statutory requirement that absent parents be reported to law enforcement officials would be

[48] California offers no such assistance to a welfare family with a nonsupporting man in the house. The State will, however, prosecute both the man and the welfare mother for misuse of welfare funds to meet the man's needs in accordance with Calif. W. & I.C. § 11480. *See* n. 28, *supra*, p. 26.

a nullity. The "very purpose of such referrals is to institute nonsupport proceedings." *Id.* at 331.

The HEW regulation ensures that an assumption that income is available from a man in the house will not be made the basis for welfare grant reductions when the man's relationship to the needy family does not in the common experience offer the child meaningful economic protection. Thus, the man must be ceremonially married to the mother of the needy children and under a generally applicable duty of support. 45 C.F.R. § 203.1(a). HEW thereby recognizes that only enforcement of a support duty —not an assumption that it is discharged—can be an equivalent substitute for AFDC assistance.[44] Because the HEW regulation further implements the principle of the affirmative pursuit of resources through court proceedings, the approach favored by Congress and approved by *King* v. *Smith*, it clearly comports with the purposes of the Social Security Act.

(c) *The HEW Regulation Reinforces the Statutory Mandate to Maintain and Strengthen Family Life.*

Section 401 of the Social Security Act, 42 U.S.C. § 601, declares the intent of Congress in passing the AFDC program

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

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[44] California's practice, as has been pointed out, is contra. *See* n. 39, *supra*, p. 33.

Indeed, Congress has recently directed states to implement AFDC programs so as to "maintain and strengthen family life." 42 U.S.C. §602(a)(14), (15), 81 Stat. 878 (1968). Rules and practices interfering with such objectives would, of course, be invalid. *King* v. *Smith*, 392 U.S. 309 (1968).[46]

The HEW regulation acts to prohibit man-in-the-house rules which, in fact, accelerate family dissolution and promote dependency and broken homes. In operation, man-in-the-house budgetary rules reduce the financial resources of the needy family. Theoretically available income may never be received, nor can its contribution be readily compelled. Nevertheless, needy children are told to meet their subsistence needs with reduced welfare grants.[46]

The common result of the application of such rules is the break-up of the family unit.[47] For example, in the cases of intervenors Bell and Sims, the stepfathers left their families because they were unable to meet even the basic needs of the family on the reduced grant offered by the welfare department. P.R. 56, 71. In the words of the court below [A. 45], the California laws

> induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the MARS. Men who respond

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[46] *See* n. 12, *supra*, p. 16.

[46] *See supra*, pp. 33-35.

[47] Professor tenBroek noted in *California's Dual System of Family Law: Its Origin, Development, and Present Status* (Pt. III), 17 Stan. L. Rev. 614, 658 n. 999 (1965), that the California man-in-the-house rules have a "deterrent effect on stable common-law unions providing a two-parent home for the [needy] child."

> to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence.

To prevent such further deprivation of needy children, the HEW regulation prohibits the assumption of income unless the children have meaningful protection, such as is offered by a natural or adoptive father, or a stepfather under an equivalent support obligation.[48] In the face of facts showing that the enforcement of man-in-the-house budgetary rules conflicts with basic purposes of the Social Security Act, the HEW regulation can hardly be deemed to be contrary to the statutory design.

3. No Weighty Reasons Justify Overruling the HEW Regulation.

The court below reasoned [A. 39] that the HEW regulation violates 42 U.S.C. § 602(a)(7) because

> . . . the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to con-

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[48] The question is not (as seen by the court below) whether California "has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners" [A. 46], but rather whether state AFDC plans, such as that of California, which necessarily have this effect, are consistent with the congressional directive to "maintain and strengthen family life" under 42 U.S.C. § 601, as interpreted by HEW.

sider only resources whose receipt by the child has been proved.

However, that approach was erroneous. The question before the court below was not whether the California rule is *a priori* the "better" implementation of the statute; the question is whether the HEW regulation is valid. Section 602(a)(7) does not, on its face, preclude the HEW regulation. Indeed, the words "other income and resources" in § 602(a)(7) are "not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

While it may be true that "each State is free to set its own standard of need," *King* v. *Smith*, 392 U.S. 309, 318 (1968), Congress has specifically delegated to the Secretary of HEW the authority to implement the particular aspect of how "other income and resources" are to be considered under 42 U.S.C. § 602(a)(7). Congress has similarly authorized the Secretary to consider other aspects of state need determinations, such as earned income deductions (42 U.S.C. §§ 602(a)(7) and (8)) and cost-of-living increases (42 U.S.C. § 602(a)(23)). In giving broad powers to HEW to implement the purposes of the Social Security Act, Congress could not have intended totally to foreclose inquiry by HEW into a vital aspect of the operation of a federally-created and largely federally-financed program.[49]

[49] The court below felt that the wording of the HEW regulation —that "income . . . [be] actually available for current use on a regular basis" [45 C.F.R. § 203.1(b)]—interferes with the state's power to determine need according to state standards. But that viewpoint ignores the teaching of this Court in *King* v. *Smith*, 392 U.S. 309 (1968). It was there stated that "there is no question that *regular and actual contributions* . . . can be taken into account

Accordingly, in exercising its broad powers, HEW remains free to interpret and, if necessary, to reinforce the purposes of the Social Security Act in order to extend economic security to dependent children and to safeguard the legal rights of individuals.[50] In particular, HEW is en-

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in determining whether the child is needy," *id.* at 319 (emphasis supplied), and additionally that the state's "interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, *and* by its taking into account in determining whether a child is needy all *actual and regular contributions* to his support," *id.* at 334 (emphasis supplied). The *King* decision cannot fairly be read to support the claim that states may, in the guise of determining need, violate with impunity the fundamental purposes of the Social Security Act. *King* does hold that, notwithstanding the state's fiscal interests, a needy child may never be disqualified from AFDC assistance on the basis of an assumption that he is actually being supported by a supposed "breadwinner"—especially when that person is not actually contributing and there is not even a legal duty to support the child. *Id.* at 329.

Congress doubtless sought to establish a need determination process that would be efficient and reflective of local economic conditions. However, a delegation of *primary* authority to the states to set need standards cannot be made the basis for the seizure of exclusive control. And, assuming arguendo that the states did have exclusive authority to determine need, Congress must have intended to reserve to HEW powers to establish the outer bounds of the states' authority. Otherwise, a federal-state program would soon be swallowed by one half of the cooperative arrangement.

[50] In addition to having a range of reasonable motivations designed to implement the objectives of the Act, such as the long-standing nonassumption of income rules, HEW undoubtedly also acted so as to abide by constitutional standards in promulgating the regulation in question. For example, it is difficult to ascertain whether, in fact, the equivalent of a common-law marriage exists without seriously invading the rights of privacy of those involved. HEW doubtless considered a decision of the California Supreme Court in which welfare department practices designed to implement the very laws drawn in question in the instant case were held to violate rights of privacy and the Fourth Amendment. *Parrish* v. *Civil Service Comm'n*, 66 Cal.2d 260, 425 P.2d 223 (1967). HEW may also have considered that man-in-the-house rules are applicable to AFDC families only, and that the transfer of society's burden to

titled to insist upon the existence of proof of meaningful economic protection before it sanctions the denial of federal financial assistance to needy children. Because there are no weighty reasons to overturn the federal regulation, and because HEW has reasonably interpreted the objectives of Congress in its regulation implementing 42 U.S.C. § 602(a)(7), the regulation is valid.

II.

California's Man-in-the-House Laws Unconstitutionally Deny Needy, Dependent Children Due Process and Equal Protection of Law.

A child who is deprived of parental support, as defined by the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, qualifies for AFDC benefits, if he is needy according to standards established by state law. *King* v. *Smith*, 392 U.S. 309, 334 (1968). In determining whether a child is needy, the state must consider "any other income and resources of the child or relative claiming aid." 42 U.S.C. § 602(a)(7). Arbitrary eligibility conditions, which make a child's actual need irrelevant, are invalid. *King* v. *Smith*, *supra*. Unfair and unreasonable practices are subject to fundamental due process requirements regardless of whether welfare assistance is classified as a right or a privilege. *See Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969). Distinctions between classes of eligible children must be reasonable in light of the purposes of the AFDC program. *See Levy* v.

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a particular unrelated male may violate equal protection guarantees. *Cf. Department of Mental Hygiene* v. *Kirchner*, 60 Cal.2d 716, 388 P.2d 720 (1964), *vacated and remanded*, 380 U.S. 194, *on remand*, 62 Cal.2d 586, 400 P.2d 321 (1965).

Louisiana, 391 U.S. 68, 71 (1968); *Shapiro* v. *Thompson*, *supra* at 627-633.

The State of California has availed itself of the AFDC legislation and funding established by Congress. Calif. W. & I.C. §§ 11200 *et seq.* The method for determining need under California welfare law purports to be a calculus of a dependent child's need. The welfare department first determines according to tabulated budget standards what amount of income a particular family must have in order to meet minimum basic needs.[51] From this need figure are deducted all amounts of nonexempt income, such as child support payments or other regularly recurring income that are *actually received.* A recipient's employment income is applied to meet his needs after deductions are made for work-related expenses—limited to certain items, such as child care and union dues—and work incentive allowances pursuant to 42 U.S.C. § 602(a)(7) and (8). The amount of needs not met by the individual's income will be the amount of his welfare grant, unless it exceeds the maximum benefit level established by the state legislature. Calif. W. & I.C. § 11450(a).[52] If needs exceed the maximum benefit level, the amount of the grant will be the statutory maximum.

In determining how much AFDC assistance it will extend to a needy child, California takes into consideration the income deemed available from a man in the house, according to the conclusive presumption that such a man, who maintains a relationship with the child's mother, is contributing to the child's support. The man's income may

[51] *See* n. 3, *supra*, p. 6.

[52] *See* n. 4, *supra*, p. 7.

not be available in fact; he may fail to provide the amount of support presumed, or, indeed, any support. The welfare department nevertheless reduces or terminates the child's AFDC welfare grant without regard to the facts. California's rule does not condition eligibility on the absence of all men from the home. Appellant welfare recipients do not contend that California's man-in-the-house laws are a mirror image of the Alabama substitute father rule held invalid in *King* v. *Smith*, 392 U.S. 309 (1968). (Alabama established an eligibility rule that denied AFDC benefits to a child—no matter how needy in fact—whose mother maintained a sexual relationship with a man. Alabama claimed the man to be a "substitute father", such that the child was not deprived of parental support.) But, although California does not automatically deny aid to a needy child whose mother has a relationship with a man, it does make the child ineligible for that amount of aid assumed to be available from the man in the house without regard to whether such money is, in fact, available and received.

Needy children existing under such circumstances accordingly have less total income than other children whose basic needs are identical. The disfavored class of needy children have no opportunity to present proof—no matter how weighty—to rebut the income presumption arising from their mother's relationship to a man, whether stepfather or man assuming the role of spouse (MARS).

A. Calif. W. & I.C. § 11351 Violates Due Process by Substituting an Arbitrary Conclusive Presumption for an Opportunity to Prove the Actual Need of Dependent Children for Federal Welfare Assistance.

Calif. W. & I.C. § 11351 and implementing regulations impose an obligation on a stepfather who resides with an

AFDC family to support the needy children of his spouse to the full extent of his available income. Having created the obligation, § 11351 conclusively presumes that it will be voluntarily fulfilled. On the basis of that presumption, the welfare family's grant is reduced in the amount of the income deemed available from the man in the house. Thus, the budgetary rule established by Calif. W. & I.C. § 11351 expresses an evidentiary presumption, conclusive in nature, that the statutory support obligation is discharged.[53] *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 539 (1961); *People* v. *Owens*, 231 Cal. App. 2d 691, 697, 42 Cal. Rptr. 153, 157 (1965).

Such presumptions are legally disfavored, being permissible only when the facts presumed are true beyond a reasonable doubt and the presumption is "incapable of being overcome by proof of the most positive character." *Heiner* v. *Donnan*, 285 U.S. 312, 324 (1932). Applied in situations where a reasonable doubt exists, they deprive persons of

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[53] It might be claimed that § 11351 is a substantive rule of law which the legislature chose to express as a rule of evidence. (The California Supreme Court suggested this possibility by stating that overturning California's man-in-the-house laws "would place a premium upon an illegal relationship and operate as a deterrent to marriage of the mother and the man assuming the role of spouse." *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 540 (1961).) The outcome of this case does not turn on the ultimate nature of the rule. It is invalid whatever its form and purpose. If § 11351 is found to be a substantive rule of law, its operative effect is the punishment of needy children because of their mother's illicit conduct, and the break-up of family groups. State interests in discouraging immorality through their AFDC programs "are not presently legitimate justifications for AFDC disqualification." *King* v. *Smith*, 392 U.S. 309, 320 (1968). If the statute is a conclusive evidentiary presumption, as the text herein assumes, it denies due process by foreclosing the needy child's opportunity to present the actual facts concerning his income and resources.

property without due process of law.[54] "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment." *Heiner* v. *Donnan, supra* at 329.

California's man-in-the-house budgetary rules present a paradigm of the evils of the irrebuttable—and wholly arbitrary—presumption. That the facts presumed by California are not true beyond a reasonable doubt is an understatement. They are inherently incredible.

The arbitrary nature of the presumption is evident in the method for calculating available income. The budgetary rules recognize only limited deductions for the man's personal needs and obligations.[55] Although he is not himself a welfare recipient, the man's basic needs are reduced to the bare subsistence levels of welfare grants. Such standards have recently been held to be legally inadequate.[56] The housing allowances have been described as "mere fictions."[57] Only limited work expenses are allowed, and

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[54] Under California law, federal categorical aid payments are a statutory entitlement. *Social Welfare Board* v. *County of Los Angeles*, 27 Cal.2d 81, 85, 162 P.2d 630, 633 (1945). *See also Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969). And unreasonable conclusive presumptions in public assistance programs have been held invalid on prior occasions. *See, e.g., Robertson* v. *Born*, Civ. No. 51364 (N.D. Cal., June 12, 1969), ¶ 10,254 CCH Pov. L. Rep.

[55] Those deductions include the following items: work-related expenses; support payments actually made to dependents living elsewhere; alimony payments pursuant to court order; medical expenses; basic living expenses according to welfare standards. Calif. *MPP* §§ 44-113.23 and 113.24. *See* Appendices E and F.

[56] *See* n. 3, *supra*, p. 6.

[57] *See* n. 6, *supra*, p. 8.

those at welfare standards.[58] The amount of income deemed available under California's man-in-the-house rules is often substantially less than what is, in fact, available.[59] Thus, a man in a welfare household confronts equally unpalatable alternatives. He may attempt to discharge the obligation imposed by § 11351. To do so will likely force him to default on his debts and lose his credit standing; he must eschew charities, activities, entertainments or other pleasures he might otherwise enjoy; he must give up or lose by repossession his car, his television, and anything else being purchased on installment credit, which the California rules do not permit him to afford. Although not a welfare recipient, he must live at a welfare subsistence level. If he fails to live within those niggardly terms, his "available income" may disappear. The children will continue to receive a reduced grant, regardless of how well—or poorly—the man sustains his burden.

In the alternative, the stepfather may use his income to meet his actual, bona fide expenses and, thereby, relegate his wife's children to meeting their basic needs out of reduced welfare grants. The needy children have, of course, the comfort of the man's unfulfilled duty and their supposed right to enforce that duty.[60] But persons, who are

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[58] For example, Calif. *MPP* § 44-114.211 provides that the allowance for automobile travel is four cents per mile.

[59] In the case of the MARS who resided with the Percys, his income was approximately $370 per month. His obligations and expenses amounted to $400. Nevertheless, the welfare department found that his available income was sufficient to make the Percys ineligible for any AFDC benefits. The Percys' needs were $192, according to state welfare standards [A. 17-18].

[60] Appellees suggest that the support duty under § 11351 gives the needy children economic security. L.R. 85. But they have failed to cite any cases showing that such security exists for the children.

(*footnote continued on next page*)

by definition impoverished, cannot often afford to pursue whatever rights they may have. Free legal services—especially for domestic matters—are not yet everywhere available. Even assuming that legal remedies are available, the likely result would be the termination of the support obligation by the departure from the household of the stepfather, who would be practically unable to bear the burdens of his marriage.

A very different situation exists as to enforcement of the support obligation of a needy child's absent father. A natural father who fails to support his children is subjected to criminal liability. Calif. Pen. C. § 270. The welfare department must automatically refer any AFDC case in which the parent has failed to support to the district attorney. Calif. W. & I.C. § 11476. The welfare mother must aid in the prosecution on pain of forfeiting her children's AFDC benefits. Calif. W. & I.C. § 11477.[61] No comparable provisions ensure enforcement of a welfare stepfather's obligation.[62] The welfare mother is not even

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Their invocation of a "legal right" that has no substance for those who are purported to be protected by that right is reminiscent of the argument in defense of racial discrimination that black people also have a "legal right" to discriminate. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 21-22 (1948).

[61] *See* Calif. *MPP* §§ 42-513.2 and 513.3, set forth in Appendix F.

[62] California criminally enforces the natural father's support obligation because welfare grants can be reduced only in proportion to his *actual contributions*. Calif. *MPP* § 42-519.3 provides: "Only the contributions actually made by the absent parent on behalf of the children shall be considered in determining eligibility or the amount of aid." *See* Appendix F. A cynic might posit that California's reason for not providing for criminal enforcement of the MARS and stepfather obligations is simple: since welfare grants are *automatically* reduced according to a conclusive presumption that the obligations are met, California welfare officials have no need to ensure that the obligations are in fact discharged.

informed of the possibility of criminal prosecution of the stepfather—if such is a possibility[63]—much less required to consult and aid the district attorney so as to secure non-welfare income for their children. The ephemeral obligation arising under § 11351 hardly offers meaningful economic security to needy children whose welfare grants are calculated to meet their *present* minimum actual needs. A conclusive presumption that available income is contributed in lieu of receipt in fact of actual income does not feed and clothe presently needy children. Yet the existence of such a presumption is the sole basis for grant denials and reductions.[64]

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[63] There is no statutory equivalent to Calif. Pen. C. § 270 that provides criminal sanctions against a welfare stepfather or MARS who fails to support. Some California courts have strenuously avoided suggesting that such a support duty even exists. Thus,

> [§ 11351] does not deprive the adult male of his property. It merely states . . . that if an adult male assumes the role of a spouse his income shall be taken into consideration in determining the amount of the grant . . . . It takes nothing from him. It merely requires that his income be considered.

People v. *Rozell*, 212 Cal.App.2d 875, 878, 28 Cal. Rptr. 478, 480-481 (1963) (emphasis supplied); *People* v. *Ford*, 236 Cal.App.2d 438, 441, 46 Cal. Rptr. 144, 146-147 (1965). *See also County of Kern* v. *Coley*, 229 Cal.App.2d 172, 177, 40 Cal. Rptr. 53, 56 (1964) ("While she may have no legal right to any part of his income, such may be considered in determining the aid granted"). And a recent case suggests that even a ceremonially married stepfather may have no legal duty to support. *People* v. *Owens*, 231 Cal.App.2d 691, 697, 42 Cal. Rptr. 153, 157 (1965). For purposes of this appeal, appellants assume arguendo that a duty exists; their concern is that it is wholly unsubstantial as a means of offering needy children economic security in lieu of AFDC assistance. *See* n. 39, *supra*, pp. 33-34.

[64] The opinion below [A. 46-47] aptly characterizes the operation of § 11351.

> [Regardless of whether the stepfather or MARS makes his earnings available to the family, such income is] deemed by the state to be net income available to the family. . . . To the

The California Supreme Court has suggested that the conclusive presumption of § 11351 was designed to avoid the administrative inconveniences associated with determining how much income is, in fact, contributed by a stepfather to the needy children of his spouse. *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 539 (1961). But the conclusive presumptions invalidated in *Heiner* v. *Donnan*, 285 U.S. 312 (1932), and *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926), also purported to alleviate administrative difficulties involved in determining certain facts. The facts presumed in those cases were that gifts given within six and two years (respectively) of the donor's death were given in expectation thereof. Even though such facts related to intent, a matter especially difficult of proof, this Court still deemed the imposition of a conclusive presumption to be a denial of due process. California seeks to justify a conclusive presumption of reduced need, a fact which is certainly more capable of proof than the intent of a dead man, merely because of the presence in the home of a stepfather. Even if difficulties of proof would justify an otherwise impermissible conclusive presumption, California seems to be overdoing it. It is one thing to conclusively presume facts which are probably true, but very difficult of proof. It is quite another to conclusively presume facts

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extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the deduction though the MARS [or stepfather] fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that [the stepfather's or] MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis of those nonexistent facts.

which are difficult of proof because they are probably untrue.[65]

A further proposed justification for the conclusive presumption of decreased needs in man-in-the-house cases is the legitimate concern of the state to minimize costs. But such an interest can hardly be made the basis for denying *any* opportunity to deprived children to prove the actual extent of their needs. *See Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969).[66]

California's man-in-the-house laws impose an obligation so onerous that few, if any, men will voluntarily comply with it. The supposed obligation is unenforced by the welfare department in practice. It is, moreover, practically

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[65] Indeed, the facts presumed are so unlikely that the presumption would probably fail to meet the permissible standard for a rebuttable presumption: "[that] it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," *Leary* v. *United States,* 395 U.S. 6, 36 (1969). *See also United States* v. *Romano,* 382 U.S. 136 (1965); *Tot* v. *United States,* 319 U.S. 463 (1943).

[66] The Court in *Shapiro* v. *Thompson,* 394 U.S. 618, 637 (1968), declared that state residence requirements, although claimed by the states to guard against double payment of welfare benefits, were an unreasonable "blunderbuss method of denying assistance to all indigent newcomers for an entire year."

Also disposed of was the states' contention that they had a legitimate interest in discouraging those indigents who immigrate solely to secure larger welfare benefits. The Court held that the residence laws invoked by the states were all-inclusive,

> lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. . . . [The state laws] enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption. [*Id.* at 631.]

unenforceable by welfare mothers and children. The effect of the conclusive presumption that the duty is discharged is that welfare grants, providing for the minimal needs of children, are reduced or terminated although no support is in fact available or received. Thus a law which ostensibly provides a special support obligation for the benefit of welfare children in reality only saves the state money at the children's expense. Dependent children are given a meaningless, abstract right and an empty presumption rather than AFDC welfare assistance, regardless of their actual need. Appellants submit that needy children may not be constitutionally deprived of federal welfare assistance, without which they face miserable privation, because of a wholly arbitrary conclusive presumption that they receive equivalent economic security from a man in the house. The Fifth and Fourteenth Amendments to the United States Constitution cannot countenance such a manifestly unfair result.

B. Calif. W. & I.C. § 11351 Arbitrarily Classifies Identically Situated Classes of Needy Children Without Reasonable Relation to the Purposes of the AFDC Welfare Program.

The class of needy children represented by appellants in the case at bar includes children who are deprived of parental support in the sense of the Social Security Act. To the degree that they are needy according to standards established by the State of California, the children are eligible for federal welfare assistance under the Aid to Families with Dependent Children (AFDC) program. 42 U.S.C. §§ 601 *et seq.* All members of the class reside in households in which their mothers maintain marital or

sexual relationships with men who are not the natural or adoptive fathers of the needy children.[67] California has not conditioned AFDC eligibility on the absence of such men from the home, such as Alabama had wrongfully done in *King* v. *Smith,* 392 U.S. 309 (1968). Rather, California has subjected the class of needy children to grant reductions, complete terminations or application denials because of the man-in-the-house rules created by Calif. W. & I.C. § 11351. Those rules conclusively presume that the man provides support to the needy children, thereby reducing their need for AFDC financial assistance. That the needy children within the class do not, in fact, have the income of the man in the house available to meet their basic subsistence needs is ignored by California's rules.[68] The fact that the needy children have the same basic needs as all other children similarly situated is also irrelevant under the man-in-the-house laws. Such disparate treatment arises solely because of their mother's relationship with a man who is a stepfather to the children or assuming the role of spouse to the mother. The disfavored class of needy children suffers decreased welfare assistance because of circumstances which are beyond their control and, moreover, wholly irrelevant to their *actual* need.

The plain facts of the case at bar, as stated in the complaints and recognized by the court below [A. 38-39], are

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[67] The man-in-the-house budgetary rules are invoked when the man marries the mother of the needy children and becomes their stepfather, or assumes the role of spouse to the mother. The latter status obtains when the man has an "intimate" relationship with the mother and is in or around the home and either assuming financial burdens for the family or holding himself out in the community as spouse or parent. Calif. *MPP* §§ 42-515.412 and 515.413. *See* Appendix F.

[68] *See supra,* pp. 6-7.

that neither appellants nor the class they represent receive the sums that the welfare department irrebuttably presumes them to receive, or anything even approximating those sums. The Lewis children suffered a grant reduction of $55 because of California's man-in-the-house rule yet received no equivalent support from the MARS [A. 7-8; L.R. 4]. Mrs. Percy and her daughter were denied any part of the $148 monthly welfare grant they were entitled to because they lived with a MARS. But that man's income was not in fact available to the Percys [A. 17-18]. The Jacobs children were denied the monthly grant of $237 they were entitled to receive because their mother had remarried and their stepfather's income was assumed available to meet their needs. Their verified complaint stated that, due to his pressing personal needs and debts, the only financial assistance extended by the stepfather was of a temporary nature to meet the emergency confronting the children. And the complaint further claimed that continued application of the conclusive presumption to deprive the Jacobs children of AFDC benefits would force the stepfather to leave the home. P.R. 56. The verified complaint of the Bell family showed that the stepfather in that household had, indeed, been forced to move out because of the overwhelming financial crisis worked by the man-in-the-house rules [A. 26-27].

The validity of a discriminatory classification, such as exists under Calif. W. & I.C. § 11351, depends upon the reasonableness of the scheme in light of the purposes of the AFDC program. *See Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968). The state "may not draw a line which constitutes an invidious discrimination against a particular class." *Id. See also Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542 (1942). The line drawn must be a rational one. *Levy* v. *Louisiana,*

supra at 71. Moreover, when the classification interferes with fundamental rights, it must withstand even stricter scrutiny. *See Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969), and cases there cited. Only compelling state interests can justify the denial of basic, federally-created rights. *Id. See Levy* v. *Louisiana, supra* at 71-72.

In *Levy,* the Court held that illegitimate children could not constitutionally be denied the right to maintain an action for the wrongful death of their mother.

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . [I]n her death they [her illegitimate children] suffered wrong in the sense that any dependent would. [391 U.S. at 72.]

Similarly California may not consistent with equal protection principles discriminate against needy, dependent children solely on the basis of their mother's relationship to a man in the house. The presence in their household of a stepfather or man assuming the role of spouse (MARS) to their mother cannot be made the basis for a *conclusive* presumption that the children have less need for AFDC assistance than other needy children. If the children remain needy in spite of the man's presence, their needs cannot arbitrarily be ignored.

The operative effect of California's man-in-the-house laws clearly jeopardizes the economic security of needy children and the stability of their home. But the very purpose of the AFDC program is to extend meaningful economic security to needy, dependent children, *King* v. *Smith,* 392 U.S. 309, 325 (1968), and to maintain a stable home life for such children. Congress intended to provide needy

children with food, shelter, clothing and other necessities —not with irrebuttable presumptions. A state, utilizing federal funds to implement an AFDC program, may not act so as to inhibit the fulfillment of the central purposes of the Social Security Act. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). As the three judge court noted in *Smith* v. *King,* 277 F.Supp. 31, 38 (M.D. Ala., 1967), *aff'd on other grounds,* 392 U.S. 309 (1968), a state that has adopted an AFDC program

> is not now free to bestow the benefits of the program upon some needy children and arbitrarily to deny them to others. There cannot be any picking and choosing of the mothers and children who will be aided if it is done in an irrational or in an arbitrary manner.

While a state may properly seek to minimize the expense of administering governmental functions,[9] mere economy is not a "compelling interest" such as to justify denying basic subsistence grants to needy children. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). In holding welfare residence laws unconstitutional, this Court has stated "[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 633. *See also Rinaldi* v. *Yeager,* 384 U.S. 305, 309-310 (1966). There are available to the State other, less onerous alternatives to promote the fiscal soundness of the AFDC program. For example, the State might seek to collect the amount of support determined due from a man in the house in order to secure reimburse-

[9] The court below observed that grant reductions and denials in man-in-the-house cases may make it possible to increase welfare grants for "other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations" [A. 44].

ment of welfare assistance paid to the children. This is precisely the method used when a natural father fails to support.[70] The obvious result of affirmative pursuit of a nonsupporting man in the house would be to give the needy children actual financial aid when it is needed. Such an inquiry would also reveal what was in fact contributed by the man in the house. California, nevertheless, prefers to reduce expenses by means of an arbitrary conclusive presumption that the needs are met. The State then has no financial interest in seeing that the support obligation is discharged.[71] That approach can hardy be deemed *neces-*

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[70] *See* n. 62, *supra*, p. 49, and related text. Moreover, Congress has indicated its preference, when the welfare of needy children is at stake, for judicial fact-finding and court orders rather than arbitrary conclusive presumptions. 42 U.S.C. §§ 602(a)(16), (17), (18), (21), (22), 81 Stat. 878-9, 896-7. *See also King* v. *Smith*, 392 U.S. 309, 331-333 (1968).

[71] The court below perceived that § 11351 promotes California's fiscal interest by putting the support burden on the man in the house.

> [W]e repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. . . . We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made. [A. 47; citations and footnotes omitted.]

The court failed, however, to consider why California prefers affirmatively to enforce support obligations against natural fathers while merely assuming that a man in the house complies with his duty. If the State is required to grant full AFDC benefits unless child support payments are actually made, there is, of course, a greater interest in enforcing the support obligation in order to recoup the amounts paid as welfare assistance. *See* n. 62, *supra*, p. 49.

sary to the accomplishment of a valid state interest. *Cf. McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Thus, California has erected a classification scheme that disfavors needy children—in spite of their actual need—because their mother maintains a relationship with a man in the house. Such a scheme cannot be held to comport with the purposes of the AFDC program. In fact, the discrimination is counterproductive to the objectives of the federal legislation. Under even traditional equal protection standards, the California scheme is invalid. To hold otherwise would require the assumption that Congress "intended arbitrarily to leave one class of destitute children entirely without meaningful protection." *King* v. *Smith*, 392 U.S. 309, 330 (1968). Moreover, the scheme invoked by California is hardly *necessary* to promote the State's interest in economy. And, when weighed against federally-created rights of needy children to meaningful economic security, whatever the interests served by California's man-in-the-house rules, they are not so compelling as to justify the denial of basic subsistence to an arbitrarily selected class of needy children.[12] California's rules, therefore, abridge equal protection guarantees and are invalid.

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[12] As this Court noted in *Shapiro* v. *Thompson*, 394 U.S. 618, 627 (1968), welfare aid may determine whether needy families can obtain "the very means to subsist—food, shelter, and other necessities of life." In *Rothstein* v. *Wyman*, 303 F.Supp. 339, 346-47 (S.D.N.Y., 1969), the District Court stated:

> Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state,

Conclusion

Appellants seek the relief of this Court against California's continued application of man-in-the-house rules, which deny basic subsistence to needy children. Further litigation to resolve the issues raised in the case at bar will irreparably injure the needy families and result in malnutrition, unhealthful living conditions and disruption of family life. Such litigation is unnecessary because all parties concede, and the court below held, that the HEW regulation, 45 C.F.R. § 203.1, if valid, indisputably precludes the operation of California's man-in-the-house rules under Calif. W. & I.C. § 11351.

Accordingly, appellants respectfully request that this Court, for the reasons set forth above, reverse the decision of the Court below; declare the HEW regulation held invalid below to be a reasonable and lawful implementation by the Secretary of HEW of the Social Security Act, 42 U.S.C. § 602(a)(7); declare Calif. W. & I.C. § 11351 and implementing regulations to be invalid under the Social Security Act and HEW regulations, including 45 C.F.R.

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is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. . . . It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting constitutional rights. [Footnotes and citations omitted.]

§ 203.1; enjoin the continued enforcement of Calif. W. & I. C. § 11351 and implementing regulations; declare Calif. W. & I.C. § 11351 and implementing regulations to be unconstitutional as violative of due process and equal protection guarantees; award appellants benefits wrongfully denied them by the operation of the invalid laws; and remand for further proceedings in the District Court the question of the validity of the recently enacted statute, Calif. W. & I.C. § 11351.5.

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APPENDICES

APPENDICES

APPENDIX A

Sections 401 and 402(a)(7) of the Social Security Act, 42 U.S.C. §§ 601 and 602(a)(7)

42 U.S.C. § 601 (Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627):

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. § 602(a)(7) (amended by Act Jan. 2, 1968, P.L. 90-248, Title II, Part 1, § 202(b), 81 Stat. 881, effective July 1, 1969):

> A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

APPENDIX B

HEW Regulation, 45 Code of Federal Regulations, Section 203.1

Sec. 203.1. Condition of plan approval: bases for determining eligibility of child.

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistence payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in paragraph (a) of this section have been inconsistent with the provision in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.

(Sec. 1102, 49 Stat. 647, Sec. 402, 49 Stat. 627; 42 U.S.C. 1302, 602).

Effective date. The regulations in this part shall be effective on the date of their publication in the *Federal Register.*

[Published on August 8, 1968, at 33 Fed. Reg., No. 154, 11290.]

APPENDIX C

Excerpts from Part IV of the Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare

3120. *Interpretation*

. . . .

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, currently available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

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3123. *Contributions From Relatives*

The Federal Act does not require States to hold relatives responsible for the support of applicants for or recipients of assistance. Regular and substantial contributions to the support of an applicant or recipient by relatives must be taken into account when they are actually available. Gifts from relatives and contributions of small value and occurring infrequently and unpredictably as expressions of affection are not related to the support of the recipient and should not be considered as income.

A State which holds relatives responsible for the support of applicants or recipients of assistance must provide an income scale as a method to determine whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients. Such income scales must exceed a minimum subsistence level of living and must at least represent a minimum level of adequacy which takes account of the needs and other obligations of the relative.

• • • •

It shall not be assumed that any relative whose income is below the scale is contributing to the support (or medical care) of applicants or recipients.

3124. *Court-Ordered Support Payments*

Court-ordered support payments by absent parents must be taken into account when they are in fact available to the family, but with provisions that insure that income is available to meet the needs of the mother and children on a regular monthly basis. In reviewing actual practice, it has been found that most support payments in AFDC are irregular. For families whose incomes are limited, an interruption or fluctuation in support payments can result in severe hardship to the family.

Reduced assistance payments based on assumed receipt of support payments or any other income that is not, in fact, available, are inconsistent with the welfare agency's responsibility for meeting need and strengthening family life. They result in inequity in meeting the continuing needs of the families affected.

It is incumbent on public welfare agencies to do all they can to help and encourage parents to make regular contributions to the care of their children, and to cooperate with the courts in the method designated.

The method of handling court-ordered support payments is, of course, at the discretion of each court and may vary widely within a State. For example, some payments may be ordered payable directly to the mother, some to the mother through the court, and some to the mother through the welfare agency.

The most economical method from the standpoint of the family and the welfare department is usually to have the payments made to the welfare agency, either directly by the absent parent or by the court. It is desirable that this method of payment be adopted Statewide so far as it meets approval of the courts.

. . . .

Theoretically, it would be preferable to use another method, namely, for the family to receive payments directly from the court or the other parent and to deal with the court if the support payments are not made regularly. Many of the AFDC mothers, however, do not have the "know-how" to follow through and most courts cannot assure prompt action when payments are delinquent. When this method is used, the agency must assure that public assistance payments are adjusted promptly and regularly when there is any interruption of support payments. This method is difficult to administer as well as time-consuming for the agency. Therefore, its use is recommended only when there is reasonable certainty that the support payments are being made and will continue to be made regularly . . . .

3131. *Requirements for State Plans*

. . . .

7. Effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter, the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.

. . . .

10. Effective July 1, 1967, in a State which holds relatives responsible for the support of applicants for or recipients of assistance, the State plan must provide an income scale as a method to determine whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients. Such income scale must exceed a minimum subsistence level of living, and must

at least represent a minimum level of adequacy which takes account of the needs and other obligations of the relative.

Effective July 1, 1967, the State plan must also provide that no request will be made for contributions to applicants for or recipients of assistance from relatives whose net cash income is below such scale, unless such applicant for or recipient of assistance is such relative's spouse or minor child who is living in the home with the relative.

11. Effective July 1, 1967, the State plan must assure that, when support payments by absent parents have been ordered by a court, a regular amount of income is available monthly to meet the determined needs of the mother and children whether or not the support payments are received regularly, and that the agency will not delay or reduce public assistance payments on the basis of assumed support which is not actually available.

APPENDIX D

California Welfare and Institutions Code, Section 11351

Sec. 11351. Computation of aid; stepfather's income; support by stepfather.

Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, "adult male person" means any male person of age 18 years or older. (Added Stats. 1965, c. 1784, p. ——, § 5.)

APPENDIX E

Excerpts from California State Department of Social Welfare, Manual of Policies and Procedures, as Existing at Time Suits Were Commenced

Calif. MPP §§ 42-531 and 42-535 Responsible Relatives [Superceded by §§ 42-513 and 42-515, *see* Appendix F].

42-531 THE STEPFATHER 42-531

AFDC Where a needy child lives with his mother and his stepfather, the amount of grant shall be computed after consideration is given to the income of the stepfather.

.1 *Definition*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.2 *Stepfather's Responsibility for Support*

A stepfather is responsible for the support of:

a. His children from another union living outside the home;

b. His children living in the home;

c. His wife;

d. His wife's needy children, to the extent of his ability, when his wife and her children are living in the home with him.

.3 *County Responsibility—Stepfather in the Home*

The county department is responsible for:

.31 Determining eligibility for *AFDC* of all children in the home.

.311 Children of the stepfather from his current marriage would qualify for aid only on the basis of deprivation due to unemployment or incapacity.

.312 His children of another relationship, living in the home, may qualify for aid on the basis of absence of the natural mother.

.313 The mother's children from another relationship living in the home may qualify for aid on the basis of absence of their natural father.

All eligible children would be carried as a single case.

.32 Determining the composition of the Family Budget Unit (See Section 44-213).

.33 Determining need, income and amount of grant (See Section 44-113.242 and 44-133.1).

AFDC .34 Providing services described in the Services regulations.

.35 Taking steps necessary to secure support from absent natural fathers of mother's children. (See section 42-517)

42-535 RESPONSIBILITY OF MAN ASSUMING THE ROLE OF SPOUSE 42-535

AFDC .1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

Interpretation — The following factors may substantiate that the man has assumed financial obligations or has represented himself as spouselike.

a. Man has assumed financial obligations

1. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

2. The man has paid medical or other bills incurred by the family.

3. Man has claimed mother and children as dependents in filing income tax.

b. Man represents self as spouselike

1. Representation to others, such as landlords, friends, community, as husband and wife.

2. Use of man's name by children for various purposes, including school records.

3. Man's attendance as parent at children's school function.

4. *Man is attentive to children and provides recreation, gifts, etc., or admittedly disciplines children.*

5. *Children refer to man as father.*

6. *Use of man's automobile by AFDC family or registration in man's and mother's names.*

7. *Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.*

8. *No demonstrable or confirmable alternative living arrangement other than with the AFDC family.*

These factors should not be considered an exclusive listing, for other similar factors may be used. On the other hand, the existence of a single factor may not be conclusive proof that the criteria are met. For example, a man in a courtship relationship might take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

.2 *Responsibility of Man Assuming Role of Spouse for Support*

The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

.3 *Responsibility of the County Welfare Department*

The county welfare department is responsible for:

.31 Determining eligibility for *AFDC* of all children living in the home. The children of the man assuming the role of spouse by another relationship who are living with him in the home would qualify for aid on the basis of deprivation due to the absence of their natural mother and are carried as a separate case with their father.

.32 Determining the composition of the Family Budget Unit. (See Section 44-213.1 and .2)

.33 Determining need, income, and amount of the grant. The income to the family budget unit from the man assuming the role of spouse shall be computed in accordance with Section 44-133.5.

.34 Providing services described in the Services regulations and Department Bulletin No. 624 when appropriate.

(Issues 314-317, effective 11/1/67.)

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Calif. MPP § 44-101 Income Definitions [still in effect].

AB APSB Income, generally, is any benefit in cash or in kind which is in fact currently available to the

ATD *OAS* *AFDC* individual or is received by him as a result of current or past labor or services, business activities, interests in real or personal property, or as a contribution from persons, organizations or assistance agencies. To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period. Subject to this limitation and the exemptions and exclusions, as specified in Section 44-111 of this chapter, such benefits are taken into consideration as income in evaluating the need of the recipient and in determining the amount of assistance to which he is entitled.

(Issue 95, effective 7/1/67.)

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Calif. MPP §§ 44-113.23 and 44-113.24 Deductions from Earnings [amended in part, *see* Appendix F].

AFDC .23 *Earnings — AFDC*

In order that the use of family income for expenses entailed in employment will not reduce the money available to meet basic and other needs, such expenses are to be deducted from gross earnings as follows:

.231 All involuntary deductions made by the employer.

.232 The standard allowance for food, clothing, and personal incidentals for employment as set forth in the following table:

TABLE OF STANDARD ALLOWANCES FOR FOOD, CLOTHING, AND PERSONAL INCIDENTALS RESULTING FROM EMPLOYMENT

Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance
$4 or less	All income	$13	$11	$22	$18
5	$4	14	12	23	19
6	5	15	12	24	20*
7	6	16	13	25	21
8	7	17	14	26	21
9	8	18	15	27	22
10	8	19	15	28	23
11	9	20	16	29	24
12	10	21	17	30	25**

* Maximum allowance for children under age 18.

** Maximum allowance for adult or children age 18 through 20.

AFDC .233 All other expenses incurred to retain employment. Such expenses include the cost of:

a. Transportation to and from work and on the job if not reimbursed by the employer.

b. Tools and licenses required for the job.

c. Dues to unions, business organization, employee clubs, or similar assessments.

d. Contributions to collections for employee benefits necessary to holding the job.

e. Necessary educational or training expenses related to employment including any necessary publications.

f. Care of children at or in day care facilities when the caretaker is employed.

g. Special safety devices needed by handicapped people and not furnished by the employer or another agency.

h. Telephone service required in connection with employment.

i. Unusual expenses required for employment.

(See Determination of Need Chapter for allowance for expenses to obtain employment.)

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.24 *Other Deductions from Net Income*

In addition to the deductions described above, deductions for other expenses of persons with income from any source, shall be made as follows:

.241 *Court Ordered Support Payment by Natural Parent*

Deduction for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

.242 *Stepfather*

Deduction is made from income for:

a. The support payments actually made to or for his dependents living elsewhere.

b. Alimony payments to his ex-wife in the amount of the court order.

c. The cost of medical care of the stepfather and other persons in the Family Budget Unit for whom there is no federal eligibility as child or caretaker.

(Issues 118 and 119, effective 7/1/67; Rev. 149, effective 7/1/68.)

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Calif. MPP § 44-133.5 Treatment of Income of Man Assuming the Role of Spouse [*See* Appendix G for proposed amendments].

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the *AFDC* assistance standard for the family consisting of the members of the FBU, the unmarried

father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3,* deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for *AFDC* as a separate case if his income is less than the need.

(Issue 133, effective 7/1/67.)

APPENDIX F

Regulations Promulgated by California State Department of Social Welfare Since the Suits Were Filed

Calif. MPP §§ 42-513 and 42-515 Responsibility for Support: Definitions [*See* Appendix G for proposed amendments].

42-513 RESPONSIBILITY FOR SUPPORT 42-513

AFDC .1 *Parents—General*

Parents, including the father not married to the mother, are responsible to the extent of their ability for the support and care of their children, natural or adopted. This responsibility continues even though the parent is not living with his family, the marriage has been legally dissolved, the parents are not married, or there has been a court order removing the children from the parents' custody. However, responsibility for parental support ceases if relinquishment for adoption has been signed, unless and until the relinquishment has been terminated.

AFDC .2 *Cooperation Requirement — Parent Remaining with Child*

.21 When one parent is absent, the parent remaining with the child must cooperate with law enforcement officers by providing reasonable assistance to them in the enforcement of the obligation of the absent parent to provide support for the absent parent's child(ren).

.211 For purposes of this section, if one parent has been given legal custody and control of the child such parent shall be considered the "parent remaining with the child" even though not living with the child.

.22 Any one or more of the following acts knowingly taken by the parent remaining with the child shall be deemed to be a refusal to cooperate with law enforcement officers (W&IC Section 11477):

.221 A refusal to be interviewed by the district attorney.

.222 A refusal to sign a complaint against the absent parent.

.223 A request to dismiss the complaint.

.224 The concealment of the identity or whereabouts of the absent parent.

.23 The remaining parent shall be informed of the requirement for notification and referral to the district attorney and the remaining parent's responsibility to cooperate with the district attorney as soon as it is determined that the requirement is applicable. (For limitations on interviews and statements by welfare department personnel regarding the nature of the charges which may be brought against the individual see Section 20-009.2.)

.231 The remaining parent shall be given the opportunity to withdraw the application if he or she does not wish the notification to be made or the recipient may request discontinuance if he or she does not wish the referral to be made.

.24 The signing of an application or the granting of aid shall not be construed as failure or refusal of the remaining parent to carry out his or her parental support responsibilities.

.25 The county welfare department shall have the final responsibility for determining whether the remaining parent has given reasonable assistance to law enforcement officers. In making this determination, the following factors shall be considered:

.251 The mental capacity of the remaining parent.

.252 The presence or absence of fear based on threats of physical or economic reprisal by the absent parent.

.3 *Cooperation — Guardian or Person Other Than Remaining Parent*

A guardian of a child who is not the child's parent, or person other than a guardian or parent who acts on behalf of the child, who has the legal authority to sign a nonsupport complaint against the parent may be asked to do so, but failure or refusal to comply shall not constitute noncooperation and shall not disqualify the child for aid to which the child is otherwise entitled.

.31 The guardian or person other than the remaining parent shall be informed and given the same opportunities provided for the remaining parent in Sections 42-513.23 and 42-513.231 above.

.4 *Absent Parent's Responsibility*

.41 Whenever aid is applied for or granted on behalf of a child who is not living with both parents, the absent parent is required by W&IC Section 11353 to complete a statement for purposes of determining ability to support the child. Such statement shall contain the following information:

.411 Current monthly income;

.412 Total income for the last 12 months;

.413 The number of dependents for whom support is being provided;

.414 The amount being contributed regularly for support of all children for whom application for AFDC is made;

.415 Current living expenses;

.416 Other data pertinent to determining ability to support the children.

.42 Refusal or failure of the absent parent to complete this statement requires the county welfare department to refer the case to the district attorney (W&IC Section 11353; W&IC Section 11476).

AFDC .5 *Stepfather*

A stepfather is responsible for the support of:

.51 His children from another union living outside the home;

.52 His children living in the home;

.53 His wife; and

.54 His wife's needy children, to the extent of his ability and not to exceed her community property interest in his income, when his wife and her children are living in the home with him (W&IC Section 11351).

.6 *Unmarried Father*

The unmarried father is responsible for the support of:

.61 His child (including the unborn child); and

.62 To the extent of his ability, the support of the mother and her needy children, when the mother and her children are living in the home with him (W&IC Section 11351).

.7 *Man Assuming the Role of Spouse*

The man assuming the role of spouse is responsible for the support of:

.71 His children; and

.72 To the extent of his ability, the mother and her needy children (W&IC Section 11351). (See Section 42-515.4.)

.8 *Adult Children*

Adult children are responsible for the support of their parents to the extent of their ability. However, adult children are not responsible for the support of their brothers and sisters.

42-515 Definitions for Purposes of Support Responsibility 42-515

AFDC .1 *Parents*

The natural parents, married or unmarried, are the parents of the child unless the child has been adopted. The adoptive parents are the parents thereafter.

.2 *Stepfather*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.3 *Unmarried Father*

An unmarried father is a man who is not married to the natural mother of one or more of their children even though he may be married to another woman.

.4 *Man Assuming the Role of Spouse*

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.

c. Man's attendance as parent at children's school function.

d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.

e. Children refer to man as father.

f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.

g. Use of *AFDC* family's address by man for mail, employment records, hospitalization, arrests, etc.

h. No demonstrable or confirmable alternative living arrangement other than with the *AFDC* family.

.43 *Substantiation of Relationship*

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

(Rev. 227-232, effective 3/1/69.)

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Calif. MPP § 42-519 Effect of Absent Parent Responsibility in Aid Payments [Still in effect].

AFDC .1 Aid shall be denied or discontinued for a child and for the child's parent (see Section 44-213.27) for so long as the parent who has custody and control of the child, or the parent

with whom the child resides knowingly refuses to cooperate with law enforcement officers as described in Section 42-513.2 (W&IC Section 11477).

.2 And shall not be denied, withheld or discontinued:

.21 Pending determination of the absent parent's ability to contribute;

.22 Pending receipt of the absent parent's contribution;

.23 Because the guardian or person other than the remaining parent refuses to cooperate in the enforcement of child support against the absent parent(s); or

.24 Because Child Support Services are refused, except as described in Section 42-519.1 above.

.3 Only the contributions actually made by the absent parent on behalf of the children shall be considered in determining eligibility or the amount of aid.

(Rev. 235, effective 3/1/69.)

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Calif. MPP § 44-113.23 Deductions from Earnings [Still in effect].

AFDC .23 *Expenses of Earnings—AFDC*

In order that the use of family income for necessary expenses to retain employment will not reduce the money available to meet basic and special needs, such expenses shall be deducted from gross earnings as follows: (See Section 44-111.23 for exemption to be applied against earned income.)

.231 Involuntary deductions made by the employer over which the employee has no control.

.232 Expenses for additional food, clothing and personal incidentals, allowed as a standard allowance according to the number of working days employed during the month, as follows:

1 through 5 days	$ 6.00
6 through 10 days	$12.00
11 through 15 days	$18.00
Over 15 days	$25.00

AFDC .233 The actual cost of other expenses which are mandatory to retain employment. Examples are:

a. Transportation to and from the job and on the job if not reimbursed by the employer, subject to conditions and limitations in Section 44-114.

b. Tools and licenses.

c. Dues to unions or similar assessments which are a condition of employment.

d. Necessary job-related educational or training expenses.

e. Child care, when the caretaker is employed.

f. Special safety devices not furnished by the employer.

g. Telephone service required in connection with employment.

.234 Expenses of earnings do not include items often deducted at the request of the employee but not mandatory to retain employment. Examples are:

a. Credit union shares, savings bonds, voluntary retirement, or elective profit sharing programs.

b. Elective health insurance.

c. Charitable contributions.

d. Dues to organizations where membership is not a prerequisite to employment.

e. Deductions for payments on consumer and other loans (see Section 44-113.2 regarding garnishments, etc.).

(Rev. 408 and 409, effective 7/1/69.)

APPENDIX G

California Welfare and Institutions Code, Section 11351.5, and Proposed Implementing Regulations

Calif. W. & I. C. § 11351.5 (Filed Sept. 3, 1969, c. 1417, Stat. 1969, S. B. No. 857):

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes into account such adult male person's income and expenses. The regulations formulated by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person willfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all of the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer, or boarder living in the home of a family applying for or receiving aid under this chapter.

Proposed Regulations to Implement
W. & I.C. § 11351.5

42-513.3 *Cooperation Requirement—Mother and Man Assuming the Role of Spouse* [new section to imple-

ment the cooperation requirement aspect of § 11351.5]

.31 The mother of a child for whom she is applying for or receiving AFDC and the man assuming the role of spouse shall present a written agreement to the county welfare department setting forth the facts which comprise the arrangement whereby the man shares the living expenses of the family. (W&IC 11351.5).

.32 The written agreement shall state the total estimated monthly average of the actual amount contributed to the family, and shall include a breakdown of the total to show the amount contributed:

a. To meet the board and room and other expenses of the man assuming the role of a spouse.

b. To meet or help meet the expenses of the family budget unit.

The agreement shall also state the gross amount of the monthly average amount of the man's earned income and separately, his income from all other sources.

.33 The agreement shall be signed by both the mother and the man assuming the role of a spouse under penalty of perjury. For this purpose, the agreement shall include the following statement:

"I certify through my signature that each of the statements given is true and correct to the best of my knowledge and belief. I make this statement under the penalty of perjury and

understand that any willful concealment or misstatement of material fact in this statement subjects me to the penalties prescribed for perjury in the Penal Code by the State of California. I agree to tell the county welfare department at once when there are any changes in the facts presented in this statement."

.34 Failure to cooperate by willfully and knowingly refusing to submit a written agreement to the county welfare department shall not be the basis for denying an application for aid or for discontinuing aid, except as provided in subsection 42-513.343.

.341 In situations involving failure to cooperate the county welfare department shall take immediate action to refer the cases to the district attorney for investigation and possible legal action in accordance with the requirements of Chapter 20-100, "Misuse of Funds". Concurrently, the Income Maintenance System shall refer the case to the Services System for assessment of the possible need for child protective or other services.

.342 During the investigative period, if the family is otherwise eligible, aid shall be paid and the amount of the contribution to the family (See Section 44-133.6) shall be estimated by the county welfare department taking into consideration the man's probable gross income, his expenses and the earned income exemption, and the community rate for board and room. The basis for the estimate shall be shown in the case record.

.343 If it is determined that there is no misuse of AFDC funds, but there is a continuing refusal to submit the agreement required by W&IC 11351.5 aid shall be discontinued if the probable gross income of the family budget unit and the man assuming the role of spouse is in excess of the maximum participation base for an AFDC-U family of the same size. Otherwise, aid shall continue to be paid as provided in 42-513.342 above.

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42-513.8 *Man Assuming the Role of Spouse (MARS)* [supercedes former § 42-513.7]

A man assuming the role of spouse with respect to a family applying for or receiving AFDC:

.81 Is responsible for the support of his children; and

.82 Is required to make a financial contribution to the family which shall be not less than it would cost him to provide himself with an independent living arrangement. (W&IC 11351.5) (See Sections 42-515.5 and 44-133.6.)

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42-515.42 *Substantiation of Relationship* [amends former § 42-515.43]

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse. Until the spouselike relationship is proven, the unrelated adult male living

with the AFDC family shall be considered a bona fide lodger, roomer or boarder and income to the family shall be determined in accordance with applicable provisions of Chapter 44-100.

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44-115.7 *Item of Need Contributed* [amends former § 44-115.7]

.71 When an entire item of need in the Schedules of Minimum and Special Need Allowances (Sections 44-212 and 44-265) is received free as a contribution and not as a result of service performed, the monetary value of the item as shown in the Schedules is net income. Partially free or shared living costs do not represent income, except as provided with respect to the man assuming the role of spouse (See Section 44-133.6).

.72 When a child lives with a nonneedy relative, the amount by which the relative is able and willing to meet the child's total need is net income.

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44-133.5 *Income of Unmarried Father* [amends former § 44-133.5]

.51 The amount the unmarried father is able to contribute to the AFDC family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for AFDC on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for AFDC. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of the unmarried father to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the AFDC assistance standard for the family consisting of the members of the FBU, the unmarried father and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for AFDC as a separate case if his income is less than the need.

.6 *Income of the Man Assuming the Role of a Spouse* [implements method for treating MARS income]

.61 The amount which the man assuming the role of a spouse contributes to the family budget

unit shall be not less than $65 monthly, the minimum amount of the OAS allowance for a recipient living in a board and room arrangement. (See Section 44-208.1)

.62 Net income to the family from the contribution made by the man assuming the role of spouse shall be the sum of the following:

.621 Ten percent (10%) of the estimated monthly average of the actual amount contributed for the cost of board and room, as shown on the signed agreement presented to the county welfare department in accordance with Section 42-513.3, and

.622 The amount of additional contributions to the family, determined in accordance with the other provisions of Chapter 44-100.

.63 A determination shall be made relative to possible misuse of AFDC funds as provided in Section 20-101 (W&IC 11480) at time of application, re-investigation or any other time when there is a change in the amount of the man's income, the family's need, or conditions of the agreement between the mother and the man.

Possible misuse shall be considered to exist if the man's income, after deduction of expenses of employment and the earned income exemption in accordance with Sections 44-113 and 44-111 respectively, is less than $129.

APPENDIX H

Significance of the New MARS Statute, Calif. W. & I.C. § 11351.5

1. *The New MARS Rules.* In September, 1969, the California legislature passed Chapter 1417, Statutes 1969 (S.B. No. 857), which eliminated from W. & I.C. § 11351 all references to "an adult male person assuming the role of spouse" (MARS) and enacted a new provision, W. & I.C. § 11351.5, to deal with the MARS situation. (The text of § 11351 prior to the 1969 revision appears as Appendix D, *supra.* The text of § 11351.5 is set forth in Appendix G, *supra,* along with the text of the proposed regulations to implement the new statute.) The new statute provides in part that "[when] an unrelated adult male resides with a family applying for or receiving aid [for families with dependent children] . . . , he shall be required to make a financial contribution to the family . . . ." Further, "[t]he minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes [sic] into account such adult male person's income and expenses." The unrelated man and the mother of the children must submit an agreement under penalty of perjury regarding their living arrangements and expenses. *See also* Calif. *MPP* §42-513.33. The statute provides that failure by the mother *or* the MARS to cooperate with the Welfare Department may result in a discontinuance of aid to the family. *See* Calif. *MPP* §42-513.34.

   If the mother and MARS "willfully and knowingly" refuse to submit a written agreement as to their living arrangements and expenses, the County Welfare Department shall refer the case to the District Attorney for investigation and possible prosecution under Calif. W. & I.C. §11480, for misuse of AFDC funds. Calif.

MPP §42-513.341. During the investigation into whether there has been misuse of funds, the Department shall determine the amount of grant to be paid the family, taking into consideration the man's probable gross income, his expenses and the earned income exemption, and the community rate for room and board. Calif. *MPP* §42-513.342. If there continues to be no written agreement, but there has been no misuse of funds, "aid shall be discontinued if the probable gross income of the family budget unit and the man assuming the role of spouse is in excess of the maximum participation base [state-imposed grant ceiling] for an AFDC-U family of the same size." Calif. *MPP* §42-513.343.

2. *Operative Effect.* Under the statute, the minimum level of contribution for the MARS "shall not be less than it would cost him to provide himself with an independent living arrangement." §11351.5. The proposed regulations set the level according to the OAS (Old Age Security) allowance for a recipient living in a board and room arrangement. Calif. *MPP* §44-133.61. That amount is $65 per month. Thus, although the man is assumed to live at an AFDC standard of living, he must contribute to the family at the higher OAS level. More importantly, there is no mechanism provided to prevent grant reductions, terminations, or denials, because of the operation of a conclusive presumption that the amount determined available from the MARS is received by the needy children, regardless of the actual facts.

The needy children have no greater degree of meaningful economic security than under former § 11351. For example, if a MARS submits an agreement calling for more money than he actually contributes, the needy children will continue under the new statutes to have less income than they are otherwise entitled to receive. Their decreased grant results from the conclusive presumption that the MARS is contributing at the agreed

upon level. The welfare department will continue to furnish needy children with a presumption that they receive money in lieu of welfare assistance. The children will remain with a "legal right" that is of dubious value. The language of the new statute suggests that the support duty owed by the MARS under former § 11351 is, if anything, diluted. The threat of prosecution under § 11480 is of little help in those cases when the man does not have the use of and is not using welfare money, but is refusing to give his income to the children to be used in place of the assistance which would otherwise be granted by the welfare department. And, even if the threat of such prosecution were real, the children would not necessarily realize any financial benefits from putting the MARS in jail.

The prospective operation of § 11351.5 in cases when no agreement exists is similarly adverse to the interest of the needy children. Indeed, the absence of an agreement denies the needy children any opportunity to prove what their needs are and what income is *in fact* available to them. Guess-work as to how much income the MARS may have available for the needy children after his probable gross income, expenses and room and board needs are estimated will do little to insure that the family will have the amount of money determined by the welfare department to be necessary for basic subsistence. A dollar less may mean no milk or school transportation money for a child; irrebuttable presumptions will continue to be administrative conveniences but not legal tender for needy families.

Thus, the new laws appear to violate the Social Security Act and HEW regulations, and due process and equal protection guarantees in essentially the same fashion as §11351 did, and continues to do, in stepfather cases. Moreover, a host of additional infirmities afflict §11351.5 and the proposed implementing regulations. The erection of a new condition of eligibility—the mother's cooperation in submitting a written agreement—which is

not provided for in the Social Security Act appears illegal. *Doe* v. *Shapiro,* 302 F.Supp. 761 (D.Conn., 1969), *appeal filed,* 38 U.S.L. Wk. 3175 (No. 805, Nov. 11, 1969). Certainly the prospect of punishing needy children by terminating AFDC benefits because of the noncooperation of a nonrecipient MARS, whose actions are obviously not within the children's control or even that of their mother, violates the principles of *King* v. *Smith,* 392 U.S. 309, 325 (1968). A written agreement extracted from the mother and MARS under threat of removal of the children from the home (Calif. *MPP* §42-513.341), or aid reductions and terminations (Calif. *MPP* §42-513.343), is hardly a voluntary one. Because such a statement might be inculpatory (for example, as to the crime of adultery, Calif. Pen. C. §269(a)), the requirement for its submission violates Fifth Amendment guarantees. The new laws clearly reveal that the crucial point in defining a MARS relationship is the time when a *sexual* relationship exists between the mother and the MARS. Until the time the unrelated male is proved to be maintaining an intimate relationship with the mother (Calif. *MPP* §42-515.411), he is presumed to be merely a lodger. Calif. *MPP* §42-515.43. Thus the statute appears to be a morality enforcement device, focusing on sexuality, rather than a *necessary* aspect of administering a financial assistance program for needy children; it therefore violates *King* v. *Smith,* 392 U.S. 309 (1968). Furthermore, the county's interest in proving that a spouse-like relationship exists raises the specter of extended inquiry into personal matters protected by the Fourth and Fourteenth Amendments. *See Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Parrish* v. *Civil Service Comm'n,* 66 Cal.2d 260, 425 P.2d 223 (1967).

3. *Impact on this Appeal.* Even if §11351.5 moots all MARS issues, the new statute leaves absolutely unaltered the rules regarding stepfathers in AFDC households. The named appellants and those members

of the class who present stepfather issues (the Bell and Jacobs children [A. 23; P.R. 56, 71]) continue to be denied their rights by reason of the §11351 man-in-the-house rules. The families who suffered grant reductions, terminations and denials because of MARS circumstances continue to present valid claims for back benefits wrongfully denied them under former § 11351. *See Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969). Finally, the effective date of the new statute was November 10, 1969. However, the state and local welfare departments continue to enforce the former MARS rules. Although hearings were held on November 13, 1969, regarding the proposed regulations to implement § 11351.5, there is no final interpretation of the statute available. The prospects for continued denial of the rights of needy children by reason of California's man-in-the-house rules are not significantly lessened by the promulgation of the new law.

Appellants submit that the issues raised in this appeal are not mooted by §11351.5. The primary issues underlying the original actions remain to be resolved. While appellants concede that this Court should remand the determination of whether §11351.5, as finally implemented by the state welfare department, is valid, they assert that the questions concerning California's stepfather rules are unchanged by the new statute. Their appeal is, therefore, properly before this Court.

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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 829

GENEVER LEWIS, et al.,
Appellants,

vs.

ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, et al.,
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ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief for Appellees

QUESTIONS PRESENTED

The Social Security Act of 1935 (49 Stat. 620), as amended, 42 U.S.C. §§ 301-1394) requires California, in determining the eligibility of a claimant of benefits under the Aid to Families With Dependent Children (AFDC) program,[1]

1. The AFDC program is one of the categorical aid programs established by the Social Security Act. It is cooperatively funded by the various states and the federal government. See 42 U.S.C. §§ 601-609 (1965). California participates in the program (Cal. Welf. & Inst. Code §§ 11200-488).

to consider the income and resources of any child or relative claiming aid or of any individual living with such child or relative.[2] By California law, both a stepfather of such child or a "man assuming the role of spouse" (MARS) to such child's mother, is obligated to support such child to the extent he is able.[3] Under these circumstances:

1. Can the Department of Health, Education and Welfare (HEW), by attempted administrative regulation,[4] prevent California from considering the income of a stepfather or a MARS as a resource of an AFDC-claimant child or relative unless the State proves that such child or relative actually receives contributions from the stepfather or MARS?

---

2. The Social Security Act requires California, and all other participating states, to submit a plan of operation to the Secretary of HEW for approval. 42 U.S.C. § 601, 602, 603, 604 (1965). Each state plan must provide, *inter alia*, that the state "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid . . . , or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming aid. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881.

3. The California statute imposing support obligations on a stepfather or MARS, Welfare and Institutions Code section 11351, was amended and section 11351.5 added in 1969, with the amendments having a stated effective date of November 10, 1969. The text of section 11351, prior to amendment is set forth in Appendix A, *infra*. The text of *amended* section 11351, and section 11351.5, is set forth in Appendix B, *infra*.

Appellants concede, as they must, that the question of the validity of the statutes as amended was not decided by the District Court and is not before this Court. Appellants' Brief, Appendix H. Consideration in this appeal, and in this brief, is limited to questions concerning the statute prior to amendment.

4. The HEW regulation (45 C.F.R. § 203.1) is set forth in Appendix C, *infra*.

2. Does the Equal Protection or Due Process Clause of the Fourteenth Amendment preclude California from decreasing the amount of public assistance of an AFDC-claimant child or relative by the amount which California obligates a stepfather or a MARS to contribute to the support of such child or relative?

SUMMARY OF ARGUMENT

The State of California requires by state law (Cal. Welf. & Inst. Code § 11351) that a needy child living with his mother and a stepfather or a "man assuming the role of spouse" (MARS) to the mother must be supported by such "man-in-the-house," to the extent of his ability, if, without such support, the child and mother would require public assistance through the Aid to Families With Dependent Children (AFDC) program (42 U.S.C. §§ 601-609). In imposing that obligation on the man, a corelative cause of action is created in the child for a breach of the statutory duty. Cal. Civ. Code §§ 241, 245, 248. Additionally, in the case of a stepfather, the child's mother under California community property law, has a "present, existing" (Cal. Civ. Code § 5105) right to one-half of her husband's (the stepfather's) earnings. These statutory "resources" of the child and mother claiming AFDC assistance are "considered" by California in "determining" the reduced "need" of the aid-claimants, as Congress has directed that they "shall" be. 42 U.S.C. § 602(a)(7).

The Department of Health, Education and Welfare (HEW), on the other hand, by attempted administrative regulation (45 C.F.R. § 203.1) has purported to disallow consideration by California of these "resources" of the child and mother claiming aid. HEW will allow California to consider a child living with a stepfather or MARS to

be less in need of taxpayer support (through expenditure of AFDC funds) only to the extent that California can perform the administrative miracle of proving in thousands of cases each month the exact dollar-amounts that the stepfather or MARS has paid to the child in obedience to California law.

This blanket determination by HEW that a California stepchild or "MARS-child" can have no "resources" other than proven income is illegal. It flies in the face of the Congressional expectation that a "breadwinner"—a man under a legal child-support duty—will obey the law and support the children in his home, *King v. Smith,* 392 U.S. 309, 329 (1968), and thus provide resources to the child which lessen the need for AFDC assistance.

In determining the extent of the stepfather's or MARS's ability to support the children in his home, California sets a priority on the child support obligation and prevents the man from squandering his earnings on other luxuries and then attempting to demonstrate that he cannot support "his" children. Equality of treatment is thus afforded to all needy children and the various types of "fathers"—natural, adoptive and stepfathers as well as MARS's—with whom they live. All "fathers" must, first of all, support the children in their homes. None of them can justify non-support by pointing to payment books for costly automobile or color television loans. By affording equality of treatment for all needy children who live with a mother and a man-in-the-house, irrespective of his marital status or biological links with the child, parity is established for all and the premium or bonus which would otherwise attach to informal marriages is eliminated.

ARGUMENT

I. The California "Substitute Father" Rules, But Not the HEW Regulation With Which They Conflict, Comport With Requirements of the Social Security Act.

The Aid to Families With Dependent Children (AFDC) program, being "based on a scheme of cooperative federalism," *King* v. *Smith*, 392 U.S. 309, 316 (1968), has as a requirement that the various state AFDC programs must conform (see 42 U.S.C. §§ 601, 602, 603, 604) to certain minimal requirements specified in the Social Security Act. One of those requirements, contained in section 402(a)(7) of the Act, is that the state "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid . . . , or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming aid. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881.

The dispute is this case concerns the proper interpretation of section 402(a)(7) of the Act with respect to the method of determining the "need" of a child living in California with his mother and either a stepfather or a "man assuming the role of spouse" (MARS) to the mother.

On the one hand, California obligates a stepfather or a MARS to support a needy child in his home if he is able. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*). To the extent to which California determines the man able and obligated to support the child, the State regards the child as having a resource which must be considered in the determination of need, and thus of extent of eligilibity to receive AFDC benefits. The amount of the public assistance grant is adjusted downward accordingly.

The Department of Health, Education and Welfare does not share California's view of the dictate of section 402 (a) (7) of the Act. Rather, HEW has ruled, effective August 8, 1968 (33 Fed. Reg. 11290), that with respect to a stepfather or MARS, a state may reduce the amount of AFDC assistance only to the extent that the state can prove *actual contributions* by the man to the AFDC child. 45 C.F.R. § 203.1 (Appendix C, *infra*).[5]

While the conflict between HEW (and appellants) and the State of California is clear, it should be stressed that California does not base its position in any way on the archaic and discredited argument (see *King* v. *Smith, supra,* 392 U.S. at 333 n. 34 and cases cited therein) that it need not comply with section 402(a)(7) as a condition of receiving federal funds for operation of the AFDC program in California. California must comply with section 402(a)(7). However, *so must HEW. King* v. *Smith, supra,* 392 U.S. at 333 n. 34. The Secretary of HEW has the "power to fill up the details," *United States* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77, 85 (1932), but that authority is limited to promulgating "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302. It is axiomatic that the Secretary is "required to follow Congressional mandate, whether explicit or ascertainable as inherent in underlying policy," *United Steel Workers of America v. N.L.R.B.,* 390 F.2d 846, 851 (D.C. Cir. 1968), *cert. denied,*

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5. The HEW regulation does not require proof of actual contributions from a stepfather if he is "legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. § 203.1(a). Since stepfather liability differs from natural father liability in California (compare Cal. Civ. Code § 209 and Cal. Welf. & Inst. Code § 11351 with Cal. Civ. Code §§ 242 & 196a), proof of actual contributions by a stepfather would appear to be necessary under the HEW rule.

391 U.S. 904, and "[a] regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. C.I.R.*, 297 U.S. 129, 134 (1936).

In this case, as the District Court correctly held,

> "By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of . . . [section 402(a)(7) of the Act] to consider 'other resources of the child.' It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the Congression [sic] mandate are, in the view of this court, invalid." A. 40 (material in brackets added.)

A. The HEW Regulation Conflicts With the Express Provisions of the Social Security Act.

Congress has commanded California to consider *any* income *and* resource of a child or relative claiming AFDC assistance as an essential determinant of the need of the claimant. 42 U.S.C. § 602(a)(7). In issuing that directive, Congress used the conjunctive "income *and* resources." Obviously, it contemplated that something more than *actual income* of the child must be considered, *viz.*, other resources. On its face, the HEW regulation (45 C.F.R. § 203.1, Appendix C, *infra*), as applied to a stepfather or MARS in California, is in direct conflict with this requirement of the Act. It purports to allow California to consider only the *income* which the state can prove was actually contributed to the child. Indeed, by administrative fiat, an AFDC child living with a stepfather or MARS is declared to be incapable of

having "resources" other than actually proven income. After ad hoc examination, it might be determined that a particular child or group of children may in fact be without resources, but to pronounce all children *living with* a MARS or stepfather to be *a priori* resourceless is to belie the obvious, at least in California. Moreover, that pronouncement by HEW (45 C.F.R. § 203.1) is in direct contravention of section 402(a)(7) of the Act, and is invalid.

B. The HEW Regulation is in Excess of the Purposes, as Articulated by This Court, of the AFDC Program.

A federal administrative regulation, such as the one of HEW at issue in this appeal, must comport with the enabling legislation, *including* the Congressional mandate as it is "ascertainable in underlying policy." *United Steel Workers of America* v. *N.L.R.B.*, 390 F.2d 846, 851 (D.C. Cir. 1968), *cert. denied*, 391 U.S. 904. The purposes of the AFDC program are easy of ascertainment for they are forcefully articulated and delimited by this Court in *King* v. *Smith*, 392 U.S. 309 (1968). Simply stated, "AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners." *Id.* at 329-30. Congress assumed that a "breadwinner" would support his children, thus obviating or lessening the need for public support of the child. "This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children." *Id.* at 329. Congress used the shorthand label "parent" for the type of breadwinner contemplated and provided for AFDC eligibility for the limited group of needy children who lacked the resource of a support obligation owed by such a person. *Id.*

Nowhere in the *King* decision does this Court indicate that blood ties between the breadwinner and the child or marriage vows between the wage-earner and the child's mother, are the bases for the Congressional expectation of parental support such as to obviate or lessen the need for AFDC assistance. That decision makes absolutely clear that the essential factor, rather, is the existence of a breadwinner's legal duty to support the child and the Congressional expectation of obedience to the law.

The HEW regulation is founded on a premise quite different from the one articulated by this Court in *King*. HEW has ruled that only a natural or adoptive parent or a stepparent who is legally obliged to provide child support to the same extent as a natural parent can ever be a "parent" within the meaning of the Social Security Act. 45 C.F.R. § 203.1(a). Thus, HEW's expectation apparently is that a child derives economic protection from his biological links with a father or from his mother's marriage certificate. 45 C.F.R. § 203.1(a). But since Congress anticipates that "meaningful economic security," 392 U.S. at 332, inures to a child to whom any "breadwinner" owes a legal duty of support, HEW may not, as it has attempted, vary that Congressional expectation, or purport to compel California to deviate from the Congressional scheme.[6]

---

6. As appellants candidly assess the situation (Appellants' Brief at 19), HEW has decided to outlaw "substitute parent" rules—irrespective of circumstances—as indeed it has. Appellants, however, express no alarm over this since they characterize the HEW regulation merely as reflecting a "recurrent theme" of HEW that income and resources may never be "assumed," but rather, must always be proved to have been "actually received." Appellants' Brief at 18.

The evil of the HEW regulation is that it prohibits California from considering a resource of AFDC claimants —a resource which is very real and which offers "parental" economic protection to the claimants in lieu of expenditures of public assistance funds. That resource of the claimants is the support obligation owed them by the stepfather or MARS. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*).

To be sure, there has been an undercurrent theme in HEW pronouncements that income is not to be assumed in determining need. See HEW, *Handbook of Public Assistance Administration*, Part IV, § 3120, 3131(7) (Appendix C, *infra*); HEW, Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968); 45 C.F.R. § 203.1(b). Equally certain is the fact that the theme has received a "stamp of approval" by this Court. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

However, the doctrine of "non-assumption of income" has always been a limited one—a doctrine applied only to an *absent* "parent." Throughout all of the HEW pronouncements, including the presently-in-force regulation (45 C.F.R. § 203.1) allowance is made for "assumed income and resources" of a needy child *living with* an employed natural or adoptive father. And clearly, this allowance must be made because Congress requires it. Congress anticipates that a "*breadwinner*"—a man legally-obligated to support a child—will support the children *in his home*. *King* v. *Smith*, *supra*, 392 U.S. at 329. Necessarily implicit in that anticipation or expectation is the "assumption" of the "breadwinner's" income inuring to the benefit of the child through the legal support duty. And clearly, that "assumption of income" doctrine has the "stamp of approval" of this Court in *King* v. *Smith* to the extent that it is applied to a *support-obligated* man-*in-the-house*. In no way can the decision in *King* v. *Smith* be read to necessitate or justify an administrative prohibition against all "assumption of income" or against all "substitute parent" rules. In *King*, Mr. Williams, the paramour of Mrs. Smith, with whom she had an occasional rendezvous, was only a "transparent fiction," *Id.* at 334, of a substitute father. In comparison, a MARS in California, is by definition (see California, State Department of Social Welfare, Public Social Services Manual §§ 42-515, 42-535, Appendix D, *infra*) living with the AFDC-claimant child and mother, and must by California law (Welf. & Inst. Code § 11351, Appendix A, *infra*) support them. There is no "recurrent theme" of "non-assumption of income" in either the statements of HEW or of this Court which may be applied to a MARS, or, *a fortiori*, a stepfather in California.

California imposes a legal duty of support on all "fathers"—natural[7] and adoptive[8] fathers and upon a stepfather and a MARS.[9] Concededly, the extent of the "parental" liability is different. The duty on the natural or adoptive father is unqualified by the statute, whereas the obligation of a stepfather or MARS is a limited one. However, that difference is also reflected in the treatment of the respective children concerning their AFDC eligibility. The child living with a natural or adoptive father is ineligible for AFDC assistance,[10] since, by definition, the child is not "dependent," 42 U.S.C. § 606(a), because of the father's presence and the existence of the support obligation. *King v. Smith*, 392 U.S. 309 (1968). The child living with a stepfather or MARS is less protected because the man owes the child a possibly lesser duty. California recognizes this and, unlike Alabama in *King v. Smith, supra*, 392 U.S. at 313, does not automatically totally disqualify the stepchild or "MARS-child" from AFDC eligibility. California does not define the child as "non-dependent." Rather it measures the amount of economic security inuring to the child from

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7. Cal. Civ. Code § 242: "Every man shall support . . . his child."

8. Cal. Civ. Code § 228: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

9. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*).

10. An exception to this rule is that the states are allowed the option of considering as dependent children those living with an unemployed natural parent. 42 U.S.C. § 607. See *King v. Smith*, 392 U.S. 309, 313 n. 7, 318 n. 13 (1968). California does participate in this optional "AFDC-U" program. Cal. Welf. & Inst. Code § 11250(c). This unusual program is not pertinent to the issues of this appeal.

the support obligation fixed by law, "considers that a resource" [42 U.S.C. § 602(a)(7)], and accordingly determines the lessened need of the AFDC claimant.

The support obligation imposed on stepfathers and MARS's in California is not merely something totally ephemeral or a figment of the imagination of welfare administrators. It is of real legal substance,[11] creating as it does, a duty of support on the obligor-man and, of course, a corelative cause of action in the obligee-child for a breach of the duty. Cal. Civ. Code §§ 241, 245, 248;[12] Note, *Social*

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11. In addition to "legal substance," an observation of Professor tenBrock should be noted:

> "Quite regardless of the presence or absence of legal liability, most stepfathers do support their stepchildren. As a practical matter, they can hardly avoid it. They all live under the common roof, view the common television and the stepchildren cannot very well be driven from the table when the parents and other children are eating." tenBrock, *The Impact of Welfare Law Upon Family Law*, 42 Calif. L. Rev. 458, 479 (1954).

Professors Lewis and Levy seem to concur in this observation. Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif.L.Rev. 748, 764-5 (1966). The observation, while made about stepfathers, would seem to be equally apt in the case of a MARS, at least in the case, such as the Lewis appellants (see Appellants' Brief at 10), where the MARS takes the woman and children into *his* home. At the very least, he is supporting them for purposes of their shelter needs.

It is, of course, the immense difficulty of measuring the extent of the contributions in thousands of cases each month, that has prompted, at least partially, the enactment of Welfare and Institutions Code section 11351. See *People* v. *Shirley*, 55 Cal. 2d 521, 525, 360 P.2d 33, 35 (1961).

12. Civil Code Sections 241, 245, and 248 are provisions of the California version of the Uniform Civil Liability for Support Act and appear in Division 1, Part 3, Title 3 of the California Civil Code. In pertinent part, they provide as follows:

Section 241: "As used in this title:

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"(b) 'Obligor' means *any person* owing a duty of support."

"(c) 'Obligee' means *any person* to whom a duty of support is owed." (Emphasis added)

Section 245: "The superior court shall have jurisdiction of all actions brought under this title."

Welfare: Aid to Needy Children: "Liability of Cohabiting Male for Support," 9 U.C.L.A.L. Rev. 261, 263-4 (1962); *People v. Shirley*, 55 Cal.2d 521, 529, 360 P.2d 33, 37-38 (1961) (Peters, J., dissenting).[13]

Appellants undoubtedly will retort that an AFDC child or mother is too poor to initiate legal proceedings to vindicate his rights. With the extensive network of highly active legal offices for the poor in California (of which the various counsel for appellants are a part), one must question that contention. But the point is not pertinent. An equally impoverished child living with a natural father who fails to fulfill his obligation of support can likewise perhaps not afford to bring legal action against the man.[14] Nonetheless,

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Section 248: "The obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. The right of the county to reimbursement shall be subject to any limitation otherwise imposed by the law of this State."

13. Appellants state that they assume on this appeal that such a cause of action does exist. Appellants' Brief at 7-8 n.5. Some decisions of the intermediate California appellate courts question, without having to decide, the proposition. *People* v. *Rozell*, 212 Cal. App. 2d 875, 28 Cal. Rptr. 478, 480-81 (1963); *County of Kern* v. *Coley*, 229 Cal. App. 2d 172, 180, 40 Cal. Rptr. 53, 58 (1964); *People* v. *Owens*, 231 Cal. App. 2d 691, 697, 42 Cal. Rptr. 153, 157 (1965). The California Supreme Court has not spoken definitively on the subject; Mr. Justice Peter's dissent in *People* v. *Shirley*, 55 Cal. 2d 521, 529, 360 P.2d 33, 37-8 (1961) is the most precise statement from that court on the issue. Recently, the question was averted, as being unnecessary to a decision, by the California Supreme Court. *People* v. *Gilbert*, 1 Cal. 3d 475, 482-4, ... P.2d ..... (1969).

14. Moreover, the law imposing support liability on a MARS in particular, has perhaps even a greater "clout" to it than the laws obligating a ceremonially married father. Unfettered by the prospects of a costly divorce to undo a formal marriage, the woman living with a MARS has an additional weapon conferred by Welfare and Institutions Code section 11351. As Professors Lewis and Levy put it, the "MARS-woman" can threaten, with real

because of the state-imposed legal duty of support on the man, Congress anticipated that the law would be obeyed, *King v. Smith, supra,* 392 U.S. at 329, thus obviating or lessening the need for AFDC assistance. California shares that expectation with respect to all "fathers" on whom it imposes a support duty.

Moreover, in the case of the stepfather in California—the man who has ceremonially wed the mother claiming AFDC on behalf of herself and her child—the presence of the "resource" of the aid-claimant, which the Social Security Act commands be considered [42 U.S.C § 602(a)(7)], is even clearer.

As part of its Spanish heritage [see 1 Armstrong, *California Family Law* 431-2 (1953)], California maintains

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meaning, " 'Support me and the kids,' [Mr. MARS,] 'or out you go!' " Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif.L.Rev. 748, 779 (1966) (material in brackets added.)

That certain MARS will respond to the mother's threat by leaving rather than paying the support is, of course, a possibility. Appellants embellish their statement of the facts of this case with a recital that this kind of drama has occurred to them. Appellants' Brief at 10-11. Such occurrances *may* be a socially undesireable phenomena, but the law which causes results which are possibly "unwise, improvident, or out of harmony with a particular school of thought," *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955), is not thereby defective under the Constitution. There is nothing in the Social Security Act which indicates that Congress was, or is, of the opinion "that children will develop more favorably without a 'father' than they will with a financially able 'father' who refuses to support them," Lewis & Levy, *supra,* 54 Calif.L.Rev. at 780—or vice-versa for that matter. All that Congress expects is that a man who is obligated to support a child will do so. *King* v. *Smith*, 392 U.S. 309, 329 (1968). Thus, since neither the Act of Congress nor the Constitution proscribes the enactment of a law by California which *may* cause a MARS to desert his family, if appellants believe that the possible effect of the law is so socially unsound as to warrant a change in the law, they should seek to have legislators, not Justices of the Supreme Court, make the change. *Cf. Ferguson v. Skrupa,* 372 U.S. 726, 729-80 (1963).

a system of community property between spouses. All property, including earnings, acquired by either husband or wife during marriage, other than by gift, bequest, devise, or descent, is community property. Cal. Civ. Code §§ 5107, 5108, 5110.[15] Significant in the California marital property system, for purposes of the present inquiry, is the law that "[t]he respective interests of the husband and wife in community property during continuance of the marriage relation are *present, existing,* and *equal* interests . . . ." Cal. Civ. Code § 5105 (Emphasis added).[16] Thus, by express statute, one-half of the husband's earnings is the wife's—an interest "existing" at "present."[17] Totally aside

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15. Cal. Civ. Code § 5107: "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property."

Cal. Civ. Code § 5108: "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

Cal. Civ. Code § 5110: "All other real property situated in this state and all other personal property wherever situated acquired during the marriage by a married person while domiciled in this state is community property . . . ."

These three sections of the California Civil Code bear new numbers (5107, 5108, 5110) effective January 1, 1970, but do not vary in content from their respective predecessor sections, Cal. Civ. Code §§ 162, 163, 164.

16. Civil Code section 5105 is a new statute, effective January 1, 1970. However, it repeats *in haec verba* its predecessor statute, Civil Code section 161a.

17. The wife's "present, existing and equal" (Civ. Code § 5101) rights are not merely paper fictions. The California courts, in innumerable decisions [see generally, 1 Armstrong, *California Family Law* 585-669 (1965)], have assured that the statute is not "spineless." In fact, for a violation of her rights in the community property, the wife may obtain vindication and relief even after the husband's death. See, *e.g., Ballinger* v. *Ballinger*, 9 Cal.2d 330, 70 P.2d 629 (1937).

from the obligation of the stepfather's duty to support the child, the child's mother (the wife of the stepfather) who is a "relative claiming aid" [42 U.S.C. § 602(a)(7)] has a "resource"—her "present, existing" (Cal. Civ Code § 5105) right to one-half of her husband's earnings—which Congress has commanded must be considered in determining the need of the AFDC claimants.[18] 42 U.S.C. § 602(a)(7). Since the HEW regulation prohibits California's consideration of this resource of the mother claiming aid, it is invalid.[19]

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18. It must be emphasized that California, unlike Connecticut in *Solman* v. *Shapiro*, 300 F. Supp. 409 (D. Conn. 1969), *aff'd mem.*, ... U.S. ....., 38 U.S.L.W. 3115 (October 14, 1969), is not considering the resources of the stepfather or MARS. It is considering the resources of the AFDC claimants—the child and his mother. It is thus irrelevant and unnecessary to discuss the appropriateness of the "essential person doctrine" (see *Solman* v. *Shapiro*, *supra*, 300 F. Supp. at 414-15) upon which HEW apparently justifies its regulation (see A. 52-57) and upon which appellants place considerable emphasis. See Appellants' Brief at 26-8 & nn. 27-31. It matters not that the stepfather or MARS may not be an "essential person." The child and his mother, the persons claiming aid, have resources under California law which the state is directed by section 402(a)(7) of the Act to consider.

19. Appellants seem to be striving to create the impression that the support obligation owed by a natural father to his child is somehow "more enforceable" than the obligation owed by a MARS or stepfather. See Appellants' Brief at 31-2 & nn. 33-37. It is perhaps unlikely that a child in any family, which is by definition, impoverished, will actually sue the "father"—be he a natural father, an adoptive father, a stepfather, or a MARS-father. Nonetheless, the cause of action for a breach of the statutory support duty exists to the same extent in all children of defaulting "fathers." See pp. 12-14, *supra*. So far as civil remedies exist against a "father" *living in the home* with the needy child, in all cases, the child, and not the state (see n. 27, *infra*) must pursue the remedy.

It is true that the obligation owed by a natural father to his child, but not that owed by a stepfather or MARS, is also criminally enforceable. Cal. Pen. Code § 270. Certainly it strains credulity to think, however, that a natural father supports his child because

Appellants, in urging the validity of the HEW regulation, argue that it "reinforces the statutory mandate to maintain and strengthen family life." Appellants' Brief at 26. It is true that the appropriations authorized by Congress in the AFDC program are "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life. . . ." 42 U.S.C. § 601. But it must be remembered that AFDC assistance is contemplated only for "dependent" children—those who reside with only *one* parent or relative. 42 U.S.C. § 606(a). Thus when Congress speaks in terms of aid to "needy dependent

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of an omnipresent threat of prosecution by the state for failure to do so. But even to the extent that such is true, it must be noted parenthetically that the child's *mother* also is subject to prosecution under Penal Code section 270. One may speculate with approximate equal accuracy that a woman married to a stepfather of a needy child will be prompted to assure, out of fear of criminal prosecution, that *her* vested one-half present interest in her husband's community property earnings is being utilized for her child's support. Moreover, if a man is actually prosecuted for nonsupport, and put in jail after a conviction under Penal Code section 270, he affords *no* "adequate economic protection," *King* v. *Smith*, *supra*, 392 U.S. at 332, and the underlying purpose of the AFDC program will have been subverted.

Appellants note the Congressional preference for "affirmative pursuit of resources." Appellants' Brief at 36-8. To the extent that that argument may overlap their contention that somehow MARS-children are less protected than, *e.g.*, natural children, it must be noted that notwithstanding the obligation of a MARS and a stepfather to support the children in his home, the *natural* father of those children is not relieved of his duty to support them. Cal. Welf. & Inst. Code § 11351. And in California, a natural father, whether his children are legitimate or illegitimate (Cal. Civ. Code § 196a), must support them. If there is a natural father absent from the home, but alive and well elsewhere, his resources may and must be "affirmatively pursued," irrespective of the presence of a stepfather or a MARS.

children and the parents or relative with whom they are living to help maintain and strengthen family life" (42 U.S.C. § 601), it has reference *a priori* to maintaining ties between the needy child and the one parent or relative with whom he resides.

Congress has thus declared it to be a preferable social policy to have a child raised by a parent or relative rather than as an orphan, and toward that end, financial aid is offered to maintain those *half-family* ties. Certainly the HEW regulation furthers that goal—but with a vengeance which disregards the limits declared by Congress. "Family ties" are to be maintained and strengthened at public expense through AFDC only to the extent that there is a need therefor. The extent of the need is to be determined by considering the income and resources of the aid claimants. 42 U.S.C. § 602(a)(7). The HEW regulation, in purporting to compel a disregard of resources of California AFDC claimants, strives to "maintain family life" (42 U.S.C. § 601) *at public expense* when unauthorized, indeed prohibited [42 U.S.C. § 602(a)(7)], by Congress. Therein lies the invalidity of the HEW regulation.

II. The California "Man-in-the-House" Budgetary Rule Comports With the Due Process and Equal Protection Requirements of the Fourteenth Amendment.

A. California Does Not Act to Deprive Appellants of Any Rights Guaranteed Them; A Fortiori, the State Does Not Act in Violation of the Due Process Clause.

California obligates a MARS and a stepfather, to the extent he is able, to support an otherwise needy, dependent child in his home. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*). The extent of the man's ability to provide the support is determined according to fixed state administrative standards [see California State Department of Social Welfare, *Public Social Services Manual* ("PSSM") §§ 42-531, 42-535, 44-101, 44-133 (Appendix D, *infra*)], and

to that extent, the AFDC grant is reduced. Appellants characterize this process as the creation of an unconstitutional conclusive presumption that the man is supporting the child. Appellants' Brief at 31-2.

While appellants' characterization of the budgetary rule as a "conclusive presumption" obviously is designed to evoke sympathy and shock, the State of California need not engage in semantic warfare[20] on the issue since appellants' basic argument is without merit. Their Due Process argument is based on the legally unsound premise that *all* needy children must be guaranteed AFDC assistance unless some man *actually is supporting them.* In other words, appellants urge that despite the presence in the home of a "breadwinner," the mother and children remain totally eligible for AFDC assistance unless the "breadwinner" wishes to, and does, comply with the law by paying the support which he owes. That is not the law or the purpose of the Social Security Act as interpreted by this Court in *King v. Smith.*

In examining the origins and purpose of the AFDC program, this Court stated that:

> "The AFDC program . . . was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* Implicit in this state-

20. The California "budgetary rules" state that the man *must* support the child and not that the man *does* do so.

ment is the assumption that children would in fact be supported by the family 'breadwinner.'

"The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629, as amended, 42 U.S.C. § 606(a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

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"Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." *King v. Smith,* 392 U.S. 309, 328-29 (1968) (footnotes omitted) (emphasis added).

Thus, since the intended beneficiaries of AFDC are only "parentless" children, to the extent that the child lives with a legally-obligated breadwinner, "the fact that the man in question does not actually support the child cannot be determinative." *Id.* at 329. By a parity of reasoning, to the extent that a MARS or stepfather is obligated by California law (Welf. & Inst. Code § 11351) to support otherwise needy, dependent children, the extent of actual support is not decisive.

Therefore, appellants are deprived of nothing (and *a fortiori* not in violation of due process of law) by being disallowed the opportunity of demonstrating actual nonsupport by the "man-in-the-house" since the fact "cannot be determinative." 392 U.S. at 329. It is the presence in

the home of the MARS or stepfather coupled with his statutory support obligation which determines AFDC eligibility.

In *King*, this Court noted that "a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance." 392 U.S. at 329. No due process problems inhere in such a situation despite the fact that the child is precluded from showing that the natural father has breached his duty of support. This is so for the simple reason that actual support is critical only in the absence of a *legal duty to support.* The legal duty, together with the Congressional expectation that the duty will be performed (see *King v. Smith, supra,* 392 U.S. at 329), relegates the issue of actual contributions to the realm of immateriality.[21] As this principle applies to the child living with a natural father, perforce it must apply to the step-child or "MARS-child" to the extent of the legal duty owed—precisely as it does under the California budgetary rules.

Appellants' due process argument also seems to have an undercurrent theme that the California budgetary calculations force families living with a stepfather or MARS to exist at unconstitutionally low levels. Appellants' Brief at 47-48. They complain that if the man chooses to obey California law and does support the children in his home, he will be forced "to default on his debts and lose his credit standing," and to "eschew charities, activities, entertainments or other pleasures he might otherwise enjoy,"

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21. One rebels at the notion that the needs of children may ever be considered an irrelevance. However, in directing the manner in which public money is to be distributed through AFDC, Congress has closed the door either partially or wholly, to children who have the possibility of deriving support from a legally-obligated wage-earner rather than from the public coffers. Thus, in determining AFDC eligibility, actual need is not the determining factor *if* there is legal support liability.

and may have to "give up or lose by repossession his car, his television, and anything else being purchased on installment credit." Appellants' Brief at 48.

There probably can be no question that the California budgetary rules constrict the life style preferences of many stepfathers and MARS's. Equally certain is the fact that many natural and adoptive fathers also would prefer to have the state support their children so that they would be free to revel in Elysian pursuits of their own choosing. But the power of the State of California to set priorities on a man's obligations, with child support taking precedence over television sets and automobiles, is so clear as to obviate the need for further discussion. As the District Court observed, appellants should address this complaint of theirs to the California Legislature (A. 47), although one may speculate that their contentions will sound as untenable in legislative Houses as in Courthouses.

A MARS or stepfather, lacking in great material wealth, may face a dilemma in deciding whether to pursue "carefree bachelorhood" or whether to incur obligations (Welf. & Inst. Code § 11351) along with the pleasures of a "wife" and children. But the dilemma is no greater than that faced by an equally unaffluent man who chooses to become a husband and a natural or adoptive father. For he too must incur obligations (Civ. Code §§ 242, 228, *supra*, nn. 7, 8) along with the joys of matrimony and fatherhood. Clearly the existence of such dilemmas is not of constitutional significance.

B. California Welfare & Institutions Code Section 11351 "Classifies" Needy Children in a Manner Which Is Neither Unreasonable Nor "Invidiously" Discriminatory.

Appellants contend that the California "budgetary rules" established by Welfare and Institutions Code section 11351 (Appendix A, *infra*) and the implementing regulations (Ap-

pendix D, *infra*) run afoul of the Equal Protection Clause by according discriminatory treatment to a select group of needy, dependent children—those living with a mother who lives with a stepfather or MARS. They make the conclusory allegation that "California may not consistent with equal protection principles discriminate against needy, dependent children solely on the basis of their mother's relationship to a man in the house." Appellant's Brief at 56. The State of California need not dispute this conclusion as an abstract principle of constitutional law. However, it is a principle inapposite to the California "budgetary rules" for the reason that California does not discriminate against needy, dependent children living with a MARS or stepfather.

In California, all needy children must look to the "man-in-the-house" and must utilize the resource represented by his obligation to provide them support before they may look to the state for welfare money. The needy children living with a MARS or a stepfather are not singled out for any unique treatment. The needy California child living with an employed, natural or adoptive father must derive his economic protection from the man-in-the-house who owes a duty of support (Cal. Civ. Code §§ 242, 228, *supra* nn. 7, 8). So too must the needy child living with a MARS or stepfather who likewise is obligated for support. The actual needs of the stepchild or the "MARS-child," just as with the actual needs of the natural or adoptive child, "cannot be determinative," *King* v. *Smith*, 392 U.S. 309, 329 (1968), because of the existence of the support obligation which Congress, as California, expects will be obeyed.[22]

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22. As the District Court correctly found, "[c]hildren in a MARS family are not discriminated against." A. 42. In the absence of any discriminatory treatment, the question then becomes academic whether the District Court was correct in applying the "traditional" equal protection test of *Morey* v. *Doud*, 354 U.S. 457, 463-64 (1957) (see A. 42), or whether the more stringent "compelling state interest" standards [see *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)] are applicable.

The needy children in homes with a MARS or stepfather are thus put on a parity with equally needy children living with their natural or adoptive father. Section 11351 is the final part of a comprehensive plan that imposes support obligations on all "fathers" of otherwise needy California children—natural fathers,[23] adoptive fathers,[24] stepfathers and MARS-fathers.[25] Thus, not only are the needy children treated equally, but so are all of the "men-in-the-house." There is, therefore, no premium or bonus[26] to the "father" who chooses not to formalize his marriage relationship.[27]

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23. Cal. Civ. Code § 242, *supra* n. 7.

24. Cal. Civ. Code § 228, *supra* n. 8.

25. Cal, Welf. & Inst. Code § 11351, Appendix C, *infra*.

26. The commentators, while in disagreement on many other points, all concur that, absent the support liability imposed by Welfare and Institutions Code section 11351, informal marriages would offer distinct advantages over ceremonial ones because of the incidence of child-support obligations in the latter but not the former. See Note, *Social Welfare: Aid to Needy Children: "Liability of Cohabiting Male for Support,"* 9 U.C.L.A.L.Rev. 261, 262 (1962); Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif. L.Rev. 748, 778-9 (1966); tenBroek, *The Impact of Welfare Law Upon Family Law*, 42 Calif. L.Rev. 458, 483 (1954).

27. In the District Court, appellants specifically contended that the stepfather and MARS (in addition to "their" children) in AFDC homes are denied equal protection (see A. 20, 41), because a similar support duty is not imposed on such men in non-AFDC homes. It is difficult to determine whether that argument is being urged by appellants on this appeal. If it is, it is equally without merit now as it was held to be in the District Court (A. 44-46).

It is true, of course, that a MARS or stepfather in a welfare family has to support the children in his home while one in a non-welfare family does not. However, the man in the welfare family is asking the state to support his children, while the other man is not. It is axiomatic that, consistent with notions of equal protection, the state may accord different treatment to individuals differently situated.

California treats all of its resident needy children similarly and in the manner contemplated by Congress in the creation of the AFDC program. To the extent that the needy child has the resource of a legally obligated "man-in-the-house," Congress and California both expect and require that that resource be utilized before there may be any utilization of tax dollars distributed through AFDC. This rule applies to every California "man-in-the-house"—be he a natural or adoptive father, or a stepfather or MARS.

The Social Security Act does *not* contemplate that despite the presence in the house of a man who is legally obligated to support the children of the household, that if he does not in fact support the children, the state must grant aid to the children and then attempt to recover the taxpayers' money through legal action by the state against the man. Clearly, Congress requires the *state* to affirmatively pursue non-supporting men who are *absent* from the home [see 42 U.S.C. §§ 602(a)(16), (17), (18), (21), (22), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 878-9, 896-7], but not for a man who is *present* in the house. This distinction is crucial and one which apparently eludes

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By the same token, it is neither "unreasonable," *Morey v. Doud*, 354 U.S. 457 (1957), nor "invidious," *Shapiro v. Thompson*, 394 U.S. 618 (1969), for California, recognizing the existence of subculture, informal, yet on-going "marriages," tenBroek, *California's Dual System of Family Law (III)*, 17 Stan. L. Rev. 614, 617-19 (1965), to treat such "informal families" in the same manner as formal ones. Thus, California may, with propriety, include in one class, all "fathers" in otherwise impoverished families and impose the burden on them, rather than on the state, to support the children of the family. By so doing, California avoids denying equal protection to impoverished natural fathers and removes any bonus which would otherwise inhere in "common-law" marriages over ceremonial ones.

appellants. See Appellants' Brief 37-8, 57-8.[28] If there is a legally obligated man-in-the-house, Congress expects that he will support the children, *King* v. *Smith*, 392 U.S. 309, 329 (1968), and not that the state must pay aid and pursue the defaulting man. The California plan is in total compliance with the Congressional scheme and applies with consistency to all needy children living wth legally-obligated "fathers."

California has erected no arbitrary barriers which prevent eligible needy children living with a stepfather or MARS from receiving AFDC assistance. It requires such children to look to the man for support not because the mother maintains a relationship with him, as appellants suggest (Appellants' Brief at 59), but because he is under compulsion of California law to provide that support. This is exactly what California does with all needy children living with a legally-obligated father.

CONCLUSION

Unlike the State of Alabama in *King* v. *Smith*, 392 U.S. 309 (1968), the State of California does not flatly deny to needy children "federally funded assistance on the transparent fiction that they have a substitute father." *Id.* at 334.

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28. Appellants suggest that the state should grant AFDC assistance to children living with a MARS or stepfather and then could seek to collect reimbursement from the man in the amount determined to be due. Appellants' Brief at 57-8. They seek to justify this startling proposition with the totally erroneous "comparison" that "[t]his is precisely the method used when a natural father fails to support." Appellants' Brief at 58. It is the method used against a defaulting *absent* natural father. But it is absurd to suggest that California grants assistance to a child *living with* an employed, but disobedient, natural father and then sues the father for restitution. California is prohibited from paying AFDC money to such a child who by definition [42 U.S.C. § 606(a)] cannot be a "dependent" child eligible for aid.

And unlike the State of Connecticut in *Solman* v. *Shapiro*, 300 F. Supp. 409 (D.Conn. 1968), *aff'd mem.* ..... U.S. ....., 38 U.S.L.W. 3115 (October 14, 1969), the State of California does not imagine that a stepfather will support his stepchild when state law says that he need not do so (300 F. Supp. at 412). Rather, California requires every type of "man-in-the-house"—natural and adoptive fathers, stepfathers and men "assuming the role of spouse"—to support the children of the household, if without the support the children's names would have to be placed on the welfare rolls. Congress, and California, anticipate that legal obligations will be performed voluntarily or can be compelled through legal processes. That legal power is a resource which Congress has commanded California to consider in measuring need for public expenditures.

The judgment of the District Court should be affirmed.

Dated: January 26, 1970.

Respectfully submitted,

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Appendix A

California Welfare and Institutions Code Section 11351.
Prior to 1969 Amendment

Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, "adult male person" means any male person of age 18 years or older.

Appendix B

California Welfare and Institutions Code Sections 11351 and 11351.5

As Amended in 1969 (Effective November 10, 1969)

Section 11351

Where a needy child lives with his mother and a stepfather, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather. The county granting aid shall determine if the stepfather is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather is bound to support, if able to do so, his wife's children if without support from such stepfather they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section. [Amended by Stats. 1969 ch. 1417 § 1.]

Section 11351.5

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes into account such adult male person's income and expenses. The regulations formulated

by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person willfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all of the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer or boarder living in the home of a family applying for or receiving aid under this chapter. [Added by Stats. 1969 ch. 1417 § 2.]

Appendix C

Regulations of Department of Health, Education and Welfare
Current (45 C.F.R. § 203.1)

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availabilty of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in estabishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

Obsolete (HEW, Handbook of Public Assistance, Part IV)

3131. *Requirements for State Plans*

7. Effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter, the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.

3120. *Interpretation*

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting

from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, *currently* available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

For cases in which income or resources are initially available, but are then discontinued, e.g., cases in which a payment under a court order, or contributions, continue for several months and then cease, assistance payments will need to be adjusted prompty to reflect this change in circumstances.

Assistance payments must be based on need in the light of currently available income and resources. Current payments cannot be reduced because of prior overpayments, if the recipient no longer has the income available, which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available as well as agency overpayments.

Appendix D

Regulations of California State Department of Social Welfare Appearing in "Public Social Services Manual."

42–515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

.1 *Parents*

The natural parents, married or unmarried, are the parents of the child unless the child has been adopted. The adoptive parents are the parents thereafter.

.2 *Stepfather*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.3 *Unmarried Father*

An unmarried father is a man who is not married to the natural mother of one or more of their children even though he may be married to another woman.

.4 *Man Assuming the Role of Spouse*

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the

family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.

c. Man's attendance as parent at children's school function.

d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.

e. Children refer to man as father.

f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.

g. Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.

h. No demonstrable or confirmable alternative living arrangement other than with the AFDC family.

.43 *Substantiation of Relationship*

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

.5 *Common-Law Marriage*

California law, in Civil Code Section 63, recognizes any out-of-state marriage as valid as long as it is valid where contracted or performed. In cases in which there was no formal marriage, it may be that a common-law marriage was established in another state. If the parents state they are married to each other, it is assumed that they are lawfully married unless this is refuted by other evidence.

Interpretation

Basic Requirements - Common-law Marriages

In most of the states which recognize common-law marriages, two basic requirements must be met:

1. *Agreement Must Exist to Become Husband and Wife.* This agreement may consist of a written contract, but usually is just a simple, oral statement such as "I take you for my wife" or "You are now my wife." The words used must be in the present tense, and must express an intent to assume the relationship of husband and wife at the time involved and not at some future time. The parties have capacity to enter the agreement. This means that (1) they must be of sound mind; and (2) they must be of the minimum age. At common law and in most states which recog-

nize common-law marriage, the ages are 14 for the male and 12 for the female.

2. ***Must be Cohabitation Following the Verbal or Written Statements.*** Cohabitation is described as living together as husband and wife, each assuming the marital duties implicit in the relationship, usually including but not necessarily predicated on, sexual relations.

If these two facts are established and the state where they occurred recognizes common-law marriages, a marriage is in existence which is valid for all purposes in California and which can only be dissolved by formal divorce even in the state in which it was created. There is no such thing as an informal divorce in the United States.

42-531 THE STEPFATHER

Where a needy child lives with his mother and his stepfather, the amount of grant shall be computed after consideration is given to the income of the stepfather.

.1 *Definition*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.2 *Stepfather's Responsibility for Support*

A stepfather is responsible for the support of:

a. His children from another union living outside the home;

b. His children living in the home;

c. His wife;

d. His wife's needy children, to the extent of his ability, when his wife and her children are living in the home with him.

.3 *County Responsibility—Stepfather in the Home*

The county department is responsible for:

.31 Determining eligibility for *AFDC* of all children in the home.

.311 Children of the stepfather from his current marriage would qualify for aid only on the basis of deprivation due to unemployment or incapacity.

.312 His children of another relationship, living in the home, may qualify for aid on the basis of absence of the natural mother.

.313 The mother's children from another relationship living in the home may qualify for aid on the basis of absence of their natural father.

All eligible children would be carried as a single case.

.32 Determining the composition of the Family Budget Unit (See Section 44-213).

.33 Determining need, income and amount of grant (See Section 44-113.242 and 44-133.1).

.34 Providing services described in the Services regulations.

.35 Taking steps necessary to secure support from absent natural fathers of mother's children (See section 42-517)

42-535 RESPONSIBILITY OF MAN ASSUMING THE ROLE OF SPOUSE

.1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

Interpretation — The following factors may substantiate that the man has assumed financial obligations or has represented himself as spouselike.

a. Man has assumed financial obligations

1. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

2. The man has paid medical or other bills incurred by the family.
3. Man has claimed mother and children as dependants in filing income tax.

b. Man represents self as spouselike
1. Representation to others, such as landlords, friends, community, as husband and wife.
2. Use of man's name by children for various purposes including school records.
3. Man's attendance as parent at children's school function.
4. Man is attentive to children and provides recreation, gifts, etc., or admittedly disciplines children.
5. Children refer to man as father.
6. Use of man's automobile by *AFDC* family or registration in man's and mother's names.
7. Use of *AFDC* family's address by man for mail, employment records, hospitalization, arrests, etc.
8. No demonstrable or confirmable alternative living arrangement other than with the *AFDC* family.

These factors should not be considered an exclusive listing, for other similar factors may be used. On the other hand, the existence of a single factory may not be conclusive proof that the criteria are met. For example, a man in a courtship relationship might take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has

the burden of proving that the man has assumed the role of spouse.

.2 *Responsibility of Man Assuming Role of Spouse for Support*

The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

.3 *Responsibility of the County Welfare Department*

The county welfare department is responsible for:

.31 Determining eligibility for *AFDC* of all children living in the home. The children of the man assuming the role of spouse by another relationship who are living with him in the home would qualify for aid on the basis of deprivation due to the absence of their natural mother and are carried as a separate case with their father.

.32 Determining the composition of the Family Budget Unit. (See Section 44-213.1 and .2)

.33 Determining need, income, and amount of the grant. The income to the family budget unit from the man assuming the role of spouse shall be computed in accordance with Section 44-133.5.

.34 Providing services described in the Services regulations and Department Bulletin No. 624 when appropriate.

44-101 INCOME DEFINITIONS

Income, generally, is any benefit in cash or in kind which is in fact currently available to the individual or is re-

ceived by him as a result of current or past labor or services, business activities, interests in real or personal property, or as a contribution from persons, organizations or assistance agencies. To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period. Subject to this limitation and the exemptions and exclusions, as specified in Section 44-111 of this chapter, such benefits are taken into consideration as income in evaluating the need of the recipient and in determining the amount of assistance to which he is entitled.

.1 *Separate Income*

.11 Separate income is derived from an interest in separate property; or,

.12 Income resulting from employment or military service rendered prior to the present marriage.

.2 *Community Income*

.21 Community income is generally income derived from an interest in community property; or,

.22 Income resulting from employment or military service performed during the present marriage or being performed at the time of the present marriage. *However:* If the applicant or recipient of *AB, APSB, ATD* or *OAS* has relinquished his community interest in his spouse's earnings by oral or written agreement, such income is separate income of the spouse. If it is determined that the agreement was made for the purpose of qualifying for aid or for a greater amount of aid, such income is considered community income. Earnings of an ineligible spouse up to $200 monthly net are not considered as community income. (See Section 44-131.132 and W&IC 11012); or

.23 Income from the earnings of a minor child in the home unless the child is free from parental control.

.3 *Current Income*

.31 *Current income of a recipient* is income received in the current month regardless of the period over which it accrued. *However:* (1) interest payments in decreasing amounts may be averaged; (2) if all or a portion of a cash gift or a non-recurring lump-sum payment is determined to be income, it is considered "current income" in the month following receipt (see Section 41-309.3); (3) recurring lump-sum income is considered "current income" in the months to which it is apportioned, starting with the month following its receipt (see Section 44-135.)

Any unexpected portion of current income becomes personal property on the first of the month following receipt of the income.

.32 *Current income of an ineligible spouse* is income received in the current month regardless of the period over which it accrued. Income which is temporary, received periodically, or fluctuates substantially from month to month, shall be treated as current income by converting it to a single monthly money amount based on an average of the anticipated income for the calendar year. This single amount shall be considered as the continuing monthly income from such source until a redetermination is made because of a change in circumstances not anticipated in the original determination. (For Net Income, see Section 44-113. For Division of Income with Spouse and Minor Children, see Section 44-131.1.)

Interpretation—The fact that the actual amount of income received by the ineligible spouse in a given month varies up or down from the estimated average does not mean that the determination regarding allocation to the recipient is necessarily incorrect. As long as the estimated average is a valid one, such estimated income is treated in the same manner as if it were actually received that way.

The reporting responsibility of the recipient and spouse must be considered carefully and agreed upon with them. It will generally be desirable to have all actual amounts of income received by the ineligible spouse reported monthly so that any substantial increase or decrease which would materially alter the anticipated average for the year can be considered and, when indicated, adjustment in the projected average made.

When the income of the ineligible spouse has been determined by reasonable estimate, the amount so determined is not subject to adjustment or correction on an after-the-fact basis with respect to aid already paid except as follows:

1. When the predicted income decreases substantially in a manner not anticipated and such decrease is reported promptly; or
2. When the information on which the estimate was based was incorrect or became incorrect as the result of the recipient and/or his spouse withholding or misrepresenting facts which resulted in the recipient receiving aid to which he was not entitled.

.4 *Casual Income and Income from an Inconsequential Resource*

.41 *Casual income* and inconsequential assistance is income in cash or in kind which is: (1) unpredictable as to amount and time of receipt; (2) of short duration; and (3) of negligible importance in meeting continuing needs under the appropriate aid standard.

.42 *Income from an inconsequential resource* is the net return from an interest in real or personal property which makes no appreciable contribution to the continuing needs of a recipient under the aid standard. (W&IC 11009)

Interpretation—Casual income, inconsequential assistance, and income from an inconsequential resource are excluded by code from consideration as income in determining the amount of the assistance payment.

The Federal Social Security Act provides that in determining need, "any income and resources" of the individual must be considered except a specified amount of earned income. It is not possible to define casual income or income from an inconsequential resource in terms of specific money amounts, a percentage of the grant, a specific number of days employment or any other such method which would tend to minimize individualization of the determination. Rather, circumstances must be evaluated in relation to the individual case to determine if the income is really insignificant and of negligible importance in meeting the needs of the recipient.

The following examples illustrate some types of income which usually are considered casual income or income from an inconsequential resource:

a. Income from occasional labor and services of a temporary nature and which offer no security as a regular source of maintenance.

b. Income from occasional sale of products or resulting from work engaged in wholly or primarily for its therapeutic value, such as knitting, art work, cabinet work, etc.

c. Income from occasional rental of a room which is not ordinarily advertised or listed for rent and which is rented for a short period only.

d. The value of the usual small gifts in kind given in commemoration of holidays and anniversaries; or a gift in kind earmarked for a specific purpose and not useful for meeting the continuing needs of the recipient, such as a gift of a ticket for a trip. Gifts of personal property such as a radio, refrigerator, etc. (Irregular nonrecurring gifts of money are considered personal property pursuant to W&IC 11157.)

e. Returns from home produce from garden, orchard, farm livestock, poultry, firewood, etc., which is sold or exchanged.

f. Interest on securities which has no appreciable significance in meeting continuing needs.

g. Result of occasional barter transactions, such as the exchange of wood produced on the recipient's property for work on the road leading to his house.

h. Dues and membership fees in benevolent, fraternal or other non-profit organizations which are assumed by the organization or by another person on behalf of the recipient.

i. Emergency relief granted a recipient who has lost or spent his grant.

j. Interest on a savings account in a bank, savings and loan association, or other institution authorized to accept savings. (W&IC 11009)

k. Free board and lodging received by a recipient during a temporary absence from his home of not more than one month. (W&IC 11009.1.)

.5 *Earned Income*

Earned income is income received in cash or in kind as wages, salary, commissions or profit from activities such as business enterprise, farming, etc., in which the recipient is engaged as a self-employed individual or as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock or poultry (other than sale of an entire holding). (See Section 44-135.)

Returns from personal or real property, such as net income from rental of rooms, or board and room are considered "earned income" if such returns result from an appreciable and continuous effort on the part of the applicant or recipient.

.6 *Voluntary Contributions*

A voluntary contribution is a contribution for which the contributor has no legal liability. In *ADFC* and *OAS* a contribution by a child is "voluntary" only to the extent that it exceeds the child's legal liability. (See regulations on Responsible Relatives.) Income allocated to an *AB, APSB, ATD* or *OAS* recipient by his spouse as provided in Section 44-131.132 is not considered a "voluntary contribution." However, a contribution to the recipient by a spouse from income which the spouse would otherwise be permitted to retain for his own support, is considered to be voluntary.

.7 *Recurring Lump-Sum Income*

Recurring lump-sum income is: (1) income accrued over two or more months and expected to be received at intervals in the future; and (2) a recurring benefit received less frequently than monthly.

Interpretations—Recurring lump-sum income may include payments received from sources such as crops, pensions, rentals, contributions to meet taxes, stock dividends, salaries, wages or commissions and trust fund payments. Recurring lump-sum income does *not* include:

a. Income received monthly, including any initial lump-sum payment which will be followed by monthly payments from the same source such as OASDI. (Such income is applied toward meeting needs in the month of receipt and any unexpended balance becomes personal property on the first of the following month.)

b. Rental or similar payments covering a one-month period, but received less frequently than monthly because of vacancies, etc. (Such payments are considered in the same manner as income received monthly.)

.8 *Income in Kind*

Income in kind is any benefit received other than in cash. It includes the value of need items provided at no charge. In *AB, APSB, ATD* and *OAS,* it includes the value of need items which a person, home or institution is obligated to provide the recipient pursuant to a partial life care contract, life lease or other agreement.

44-113 INCOME

.23 *Earnings—AFDC*

In order that the use of family income for expenses entailed in employment will not reduce the money available to meet basic and other needs, such expenses are to be deducted from gross earnings as follows:

.231 All involuntary deductions made by the employer.

.232 The standard allowance for food, clothing, and personal incidentals for employment as set forth in the following table:

TABLE OF STANDARD ALLOWANCES FOR FOOD, CLOTHING AND PERSONAL INCIDENTALS RESULTING FROM EMPLOYMENT

Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance
$4 or less	All income	$13	$11	$22	$18
5	$ 4	14	12	23	19
6	5	15	12	24	20*
7	6	16	13	25	21
8	7	17	14	26	21
9	8	18	15	27	22
10	8	19	15	28	23
11	9	20	16	29	24
12	10	21	17	30	25**

* Maximum allowance for children under age 18.
** Maximum allowance for adult or children age 18 through 20.

.233 All other expenses incurred to retain employment. Such expenses include the cost of:

a. Transportation to and from work and on the job if not reimbursed by the employer.

b. Tools and licenses required for the job.

c. Dues to unions, business organization, employee clubs, or similar assessments.

d. Contributions to collections for employee benefits necessary to holding the job.

e. Necessary educational or training expenses related to employment including any necessary publications.

f. Care of children at or in day care facilities when the caretaker is employed.

g. Special safety devices needed by handicapped people and not furnished by the employer or another agency.

h. Telephone service required in connection with employment.

i. Unusual expenses required for employment.

(See Determination of Need Chapter for allowance for expenses to obtain employment.)

.234 Deductions of expenses of employment for children not attending school and not setting aside an amount for further education or preparation for future employment under a plan agreed upon with the county welfare department are limited. For children 16 or 17 years of age, the deductions are limited to the extent that net income to the family is not less than $4.00 per month. For children 18 through 20 years of age, the deductions are limited to the extent that net income to the family is not less than $5.00 per month.

.235 When earnings are from self-employment or operation of a business, the expenses in Items .232 and .233 are deducted with all other normal items of expense incidental to receipt of the income. However, principal payments are not allowed except for tools and equipment essential to the employment.

.236 When an entire item of need in the itemized Cost Schedule is met in kind as a result of service performed, the monetary value of the item as shown in the Cost Schedule is income to the family. The expenses in Items .232 and .233 are deducted with all other normal items of expense incurred in securing the income to determine the net income.

.237 Exempt family earned income (as provided in Section 44-111.23) is to be deducted after all deductions for expenses of employment from income are made.

.24 *Other Deductions from Net Income*

In addition to the deductions described above, deductions for other expenses of persons with income from any source, shall be made as follows:

.241 *Court Ordered Support Payment by Natural Parent*

Deduction for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

.242 *Stepfather*

Deduction is made from income for:

a. The support payments actually made to or for his dependents living elsewhere.

b. Alimony payments to his ex-wife in the amount of the court order.

c. The cost of medical care of the stepfather and other persons in the Family Budget Unit for whom there is no federal eligibility as child or caretaker.

.243 *Child's Income*

An amount for the child's future and/or current expenditures related to the maximum development of his capabilities shall be deducted whenever income is received by or on behalf of a child. The purpose of the deduction is to provide an incentive to equip him better to participate in constructive activities in which he otherwise may be restricted. The amount for future and/or current needs must be geared to the child's age, his problems, his capacities, and the plan devel-

oped by the county welfare department with the child and family to allow him freedom to use or save income for purposes that promote self-reliance and self-improvement. The amount must be reasonable in relation to the purpose for which it is being set aside.

When the amount deducted, or a portion of it, is to be accumulated and used for *future* needs of the child related to educational, vocational, or employment plans, the funds are to be deposited in a separate account in a legal savings institution in the name of the parent or guardian and the child. Withdrawals may be made from the account for expenses for carrying out these plans as they arise when current income does not meet them. The county welfare department shall inspect the passbook every three months to insure that deposits and withdrawals are consistent with the plan.

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.5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of

spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the *AFDC* assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for *AFDC* as a separate case if his income is less than the need.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, ET AL., APPELLANTS

v.

ROBERT MARTIN, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE OF THE STATE OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court (A. 34–49) has not yet been reported.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on December 23, 1968.[1] Appellants' timely motion for a rehearing was

[1] A three-judge court was properly invoked, as required by 28 U.S.C. 2281, to consider appellants' not insubstantial constitutional contentions against the continued enforcement of the State statute. Appellants' constitutional claims were considered at length in the district court but we do not discuss them here.

denied on March 12, 1969. On May 8, 1969, appellants filed a notice of appeal to this Court, and on November 10, 1969, probable jurisdiction was noted. This Court's jurisdiction rests on 28 U.S.C. 1253.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act and implementing regulations, and the California Welfare and Institutions Code and implementing regulations, are set forth in the Appendix, *infra*, pp. 35–39.

QUESTIONS PRESENTED

The United States will discuss the following questions, which are fairly comprised within Question I of the Questions Presented in the appellants' Jurisdictional Statement:

1. Whether a "man assuming the role of spouse" ("MARS") or a stepfather who does not adopt his wife's children is a "parent" for purposes of the federal Aid to Families With Dependent Children program.

2. Whether the federal statute requiring that State welfare agencies shall "in determining need, take into consideration * * * income and resources" of any child for whom AFDC assistance is sought precludes a regulation of the Secretary of Health, Education, and Welfare excluding from such consideration any income of a person lacking a general parental obligation of support unless it "is actually available for current use on a regular basis."

We take no position with respect to the other questions discussed by the parties.

INTEREST OF THE UNITED STATES

The court below has invalidated as inconsistent with the Social Security Act a federal regulation that is of nationwide applicability and of central significance to the federal Aid to Families with Dependent Children program. This decision, if permitted to stand, will substantially frustrate the legislative purpose underlying this program.

STATEMENT

1. THE AFDC PROGRAM

This case involves the administration by the Secretary of Health, Education, and Welfare and the State of California of the Aid to Families with Dependent Children Program ("AFDC"), established by the Social Security Act, 42 U.S.C. 601–610. The Act defines a dependent child as an age eligible "needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" a specified relative. 42 U.S.C. 606(a). Federal matching funds are authorized to finance assistance to such dependent children; in fact, the federal government assumes the major portion of the program's cost.

Under the Act, a participating State[2] must submit

[2] Although participation in the program is voluntary, every State, and also the District of Columbia, Guam, Puerto Rico and the Virgin Islands, participate. See *King* v. *Smith*, 392 U.S. 309, where the nature and background of the AFDC program are described in some detail.

to the Secretary, and have approved by him, an AFDC plan which conforms with the statutory requirements and any rules and regulations promulgated thereunder by the Secretary. 42 U.S.C. 601-604. Moreover, the States are required by the Act to furnish assistance to all individuals eligible under their plans. 42 U.S.C. 602(a)(10). But the States do retain considerable latitude in allocating the resources furnished. Indeed, 42 U.S.C 602(a)(7) and (8), and implementing federal regulations, require the States to determine the needs of individuals seeking assistance, consistent with certain specified federal principles. And the State plans may provide for full or partial payment of the sums found to be needed.[3] See *Rosado* v. *Wyman*, No. 540, this Term.

The federal statute provides that the State agencies administering AFDC plans "shall, in determining need [of an eligible child], take into consideration any other income and resources [of the child] * * * as well as any expenses reasonably attributable to the earning of any such income." 42 U.S.C. 602(a)(7). Similar requirements apply to the other assistance programs

[3] Two types of reduced payments are commonly used: payments of a fixed percentage of the need; and payments to individuals or families according to need up to stated dollar maximums. California presently limits payments to stated dollar maximums. See California Welfare and Institutions Code, §§ 11450 *et seq.* A three-judge district court recently held that this statute, as administered, discriminates irrationally among AFDC recipients, and therefore violates the Equal Protection Clause of the Fourteenth Amendment. *Kaiser* v. *Montgomery*, Civ. No. 49,613 (N.D. Cal., Aug. 28, 1969), appeal pending, No. 828, this Term. See, also, *Dandridge* v. *Williams*, No. 131, this Term.

under the Social Security Act which are funded by the federal and State governments on a matching basis. See 42 U.S.C. 302(a)(10)(A) (old age assistance); 42 U.S.C. 1202(a)(8) (aid to the blind); 42 U.S.C. 1352(a)(8) (aid to the permanently and totally disabled); 42 U.S.C. 1382(a)(14) (aid to the aged, blind or disabled). These various statutory directives are implemented by a general regulation of the Secretary, which became effective on July 1, 1967, and which, as then worded, provided in part that:

> [O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.[4]

In *King* v. *Smith*, 392 U.S. 309, 319 n. 16, the Court stated that this limitation of the regulations as to what may be presumed to be resources of the child "clearly comport[s] with" the Social Security Act.

On August 8, 1968, the Secretary promulgated an additional regulation (45 C.F.R. 203.1), which elaborates this general prohibition against unwarranted pre-

[4] HEW Handbook of Public Assistance Administration, pt. IV, § 3131.7. Regulations promulgated by the Secretary, which originally appeared only in the HEW Handbook, are now being published in the Federal Register, and will appear in the Code of Federal Regulations. Section 3131.7 has now been published, in slightly altered form, in 34 Fed. Reg. 1394 (45 C.F.R. 233.20(a)(3)(ii)(*c*)), which provides:

> (ii) * * * in establishing financial eligibility and the amount of the assistance payment: * * * (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

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sumption of income with specific reference to the AFDC program. This supplementary regulation details how the general regulation referred to above applies to the statutory directive of 42 U.S.C. 602 (a)(7)—that, in determining a dependent child's need, the States must "take into consideration any other income and resources [of the child]"—in light of the eligibility limitation built into 42 U.S.C. 606 (a), which makes benefits available only to "a needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home, or * * * incapacity of a parent * * *".[8] The new regulation provides in pertinent part:

> (a) A State plan for aid and services to needy families with children * * * must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent * * * will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

[8] This new regulation came shortly after this Court's decision in *King* v. *Smith*, *supra*, which dealt with the scope of this threshold limitation of beneficiaries to children without "parents".

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. * * * [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.* [Emphasis added.]

Thus, the HEW regulations governing State AFDC plans provide that the eligibility of a child for assistance and the amount of assistance shall be determined without regard to the presence in the home of any person other than one having the same obligation of support as a natural or adoptive parent, except to the extent that a person without such an obligation is shown to be making actual contributions to the support of the child for current use on a regular basis. In other words, the regulations elaborate upon the federal statute by explicitly prohibiting any notion that a non-adopting stepfather[6] or what some States have characterized as a "man assuming the role of a spouse" ("MARS") not

[6] Throughout this brief, the word "stepfather" will, unless otherwise qualified, refer only to a man married to a child's mother who has not adopted the child.

married to the mother, may be presumed, in determining a child's needs, to be providing gratuitous support.[7]

2. THE CONFLICT BETWEEN THE FEDERAL REGULATIONS AND THE AFDC PLANS OF CALIFORNIA AND SEVERAL OTHER STATES

California has, by statute, taken a different and conflicting approach. Section 11351 of the California Welfare and Institutions Code provided (when these suits were brought) that AFDC assistance given to a child living with his mother and a stepfather or MARS "shall be computed after consideration is given to the income of the stepfather or such adult male person."[8] That Section provided additionally that "a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from [him] they would be needy children eligible for aid * * *."

In implementing regulations, the California Department of Welfare has defined a MARS as a man who, while not married to the mother and not the father of any of her children, "is in or around the home and is maintaining an intimate relationship with the mother"; and has either (1) "assumed sub-

[7] An exception is made for the situation, not directly involved in this case, where the welfare recipient elects to include such a person in the family budget unit as an "essential person". See pp. 31–33, *infra*.

[8] In computing the income of the stepfather or MARS that is available to a child, certain amounts for the man's living and other expenses are deducted. See California Department of Social Welfare, Public Social Services Manual (hereafter "California Manual"), Sections 44–133.53, 44–133.112, 44–113.2, 44–113.2(.242).

stantial financial responsibility for the ongoing expenses of the * * * family", or (2) "represented himself to the community in such a way as to appear in the relationship of husband or father, or both." California Manual, Section 42–515.4(.41).[9] The regulations specify that "[t]he amount the * * * man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the" family, and reduce AFDC payments accordingly. California Manual, Section 44–133.5(.51). A similar reduction is made on account of a stepfather's "available income" "when his wife and her children are living in the home with him * * *".[10] California Manual, Section 42–513.5(.54).[11] In both cases, the man's "available income" is added to the income of the family, thus reducing or eliminating its AFDC assistance, whether or not that amount—or any contribution—is in fact received by the family.

Practices similar to California's are found in other States.[12] For example, Hawaii,[13] Nebraska,[14] New

[9] This Section was numbered 42–535.1(.11–.13) when this action was instituted.

[10] He is also declared to be responsible for his wife and any of his children from another marriage, whether living inside or outside the home.

[11] This section was numbered 42–531.2 when this action was instituted.

[12] A compilation of the pertinent State provisions cited in this paragraph has been lodged with the Clerk of this Court and provided to counsel.

[13] Hawaii Department of Social Services Manual, Vol. I, Ch. 3, §§ 3384 and 3388.1. Following negotiations with HEW, however, the State has submitted revised plan material which, while still under review, appears likely to resolve the problem.

[14] Nebraska Department of Public Welfare, State Plan and Manual, IX–4341, 4342 par. 3, 4343 (presence in home of step-

Hampshire,[15] North Dakota,[16] Oregon,[17] and South Dakota[18] attribute income of the stepfather to the AFDC family. The income of an unrelated male living in the home, as well as that of a stepparent, is so attributed in Arizona,[19] New Jersey,[20] and New York,[21] while Washington[22] attributes the unrelated male's income. In Indiana,[23] Vermont[24] and Wisconsin,[25] the presence in the home of a stepfather makes the child

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father who is able but refuses to support makes child ineligible).

[15] New Hampshire Public Assistance Manual, Ch. III C, p. 95 (HEW informs us that the practice of the State is to assume that the stepparent's income is available, as suggested by the State's plan provisions requiring stepparents to assist or support). New Hampshire has enacted a new law which purportedly holds stepparents liable for the support of stepchildren and is of general applicability (Ch. 478 of the New Hampshire Laws of 1969, amending sections 546–A: 1, V and 167.2 of N.H.R.S.A.). An opinion of the New Hampshire Attorney General interpreting the 1969 law is under review by HEW.

[16] Public Welfare Board of North Dakota, Social Work Manual, Ch. 320, §§ 50–09–08.1 and 50–09–10.

[17] Oregon Public Welfare Department Staff Manual, Chapter II, § 2145.5.

[18] South Dakota Public Welfare Manual, Volume I, III–5A–24.

[19] Arizona, Aid for Dependent Children Manual, § 3–420.

[20] New Jersey Department of Institutions and Agencies, Division of Public Welfare Manual of Administration, Part III, § 2330. Following discussions with HEW, New Jersey has agreed to submit plan material shortly which will comply with applicable federal policy.

[21] New York Department of Social Welfare Regulations, § 353.3(a)(2).

[22] Washington Manual, Vol. II, § 8.54.

[23] Indiana Public Assistance Manual, § III–C–3.

[24] Vermont Family Services Policy Manual, Vol. II, Part III, § 2331.4.

[25] Wisconsin Laws of 1969, Chapter 154.

totally ineligible for assistance, and in Idaho[26] the presence in the home of a stepfather or "some other person acting as a parent" has that result. In Michigan[27] the plan provides that a child is ineligible if the parent is living with a non-spouse whom he or she does not take steps to marry, and in Connecticut[28] an otherwise eligible male and his children are ineligible for assistance when they share living arrangements with a female and her children.

3. THE PROCEEDINGS IN THIS CASE

The present class actions were instituted by recipients of AFDC assistance whose benefits had been reduced or terminated because of the presence in their homes of men characterized as MARS.[29] Plaintiff Genever Lewis alleged that she was the mother and guardian of two minor children; that prior to commencement of the action she had been receiving a monthly AFDC payment of $172.00; that the county welfare department was about to reduce the monthly payment to her family by $53.55; that this reduction was due to

[26] Idaho, Manual of Operating Policies and Procedures, Ch. 2, § 3240. Idaho is presently revising its plan material, and it is anticipated by HEW that the revised plan will comply with applicable federal policy.

[27] Michigan AFDC Plan, Item 259(2). HEW informs us, however, that this plan provision is not, in practice, implemented by the State.

[28] Connecticut State Welfare Department, Bulletin No. 2211, p. 3 (1968).

[29] *Lewis* v. *Stark* was instituted on October 31, 1968, and *Percy* v. *Montgomery* was instituted on November 12, 1968 (App. 1). The cases were consolidated for hearing before a three-judge district court on November 26, 1968 (A. 3).

the presence in her home of one Mr. Watson who was not married to Mrs. Lewis and had adopted none of her children; that the sum of $53.55 assumed to be available from Mr. Watson was not in fact available to her or her children; and that plaintiff had filed an administrative appeal, offering to prove that she was not in fact receiving funds from Mr. Watson, but that the county welfare department refused to consider such offer of proof (A. 7–9).

Plaintiff Margaret Percy alleged that she was the mother of one child; that she had been entitled to an AFDC payment in October 1968 of $148.00; that such payment was denied because of the presence in her home of one Melvin Jones, who was not married to her and had not adopted her child, and whose income was assumed to be, but was not in fact, available to Margaret Percy and her child; that Mr. Jones earned approximately $370 per month but had expenses of approximately $400 per month; and that the county welfare department had refused to consider evidence offered to prove that Mr. Jones was not assuming substantial financial responsibility for the family (A. 15–18).[30]

Subsequent to the filing of the above complaints, the district court granted motions to intervene made

[30] The complaint stated that, due to the emergency situation created by the welfare department's termination of benefits to the Percy family, Mr. Jones, disregarding his personal needs and the just demands of creditors, was providing some food and shelter, but that Mr. Jones could not continue to provide for the needs of the Percy family and would terminate all support as soon as the family was deemed eligible for AFDC assistance (A. 18).

on behalf of families with non-adopting stepfathers who similarly were not contributing to the children's support. Plaintiff intervenor Bertha Bell alleged that she was the mother and general guardian of five minor children; that in July 1967 she married one Maywood Bell, by whom she had a sixth child; that Mr. Bell has not adopted the other five children; that the county welfare department totally denied AFDC benefits to Mrs. Bell and her five children from April to September 1968, on the basis of income which was assumed to be, but was not in fact, available from Mr. Bell; that during this period Mr. Bell made certain emergency payments for food and shelter; that in October 1968 Mr. Bell, in order to prevent Mrs. Bell and her five children from being denied AFDC assistance, was compelled to separate from his wife and leave her residence; that this departure has deprived the Bell family of the only male figure in the household, and is causing the children severe psychological and emotional harm; and that Mrs. Bell requested and received an administrative hearing before a referee in May 1968 to contest the denial of payments to her family, but that no decision had been rendered by the time the motion to intervene was filed (A. 25–27).

The gravamen of the complaints was that the California statute and implementing regulations were invalid because they were (1) inconsistent with the Social Security Act and the Secretary's regulations thereunder; and (2) in violation of the equal protection and due process clauses of the United States Constitution, as well as an invasion of the appellants'

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right to privacy. The complaints sought injunctions prohibiting the appellee State and local officials from enforcing the challenged provisions of the State statute and implementing regulations. The plaintiffs also requested all other proper relief, which presumably would include the award of back payments.

On appellee's motion, the three-judge district court (convened pursuant to 28 U.S.C. 2281) dismissed the consolidated complaints for failure to state a claim upon which relief could be granted. The court held that the HEW regulation prohibiting presumption of income to the children in these cases (see *supra*, pp. 6–7) was inconsistent with 42 U.S.C. 602(a)(7) and therefore invalid. It also rejected appellants' constitutional claims and ruled that the California statute and regulations are consistent with the Social Security Act and valid.[31] Appellants filed their jurisdictional statement on July 7, 1969, and this Court noted probable jurisdiction on November 10, 1969[32] (396 U.S. 900).

4. SUBSEQUENT DEVELOPMENTS

On September 3, 1969, the governor of California signed into law a new Section 11351.5 of the California Welfare and Institutions Code, which became effective November 10, 1969. It leaves unchanged Section 11351 and implementing regulations insofar as they apply to a stepfather, but repeals the old Sec-

[31] The Secretary filed a post-judgment motion for leave to intervene as a party plaintiff, which was denied.

[32] The United States filed a brief *amicus curiae*, in support of appellants' jurisdictional statement, on July 31, 1969.

tion 11351 insofar as it applied to "an adult male person assuming the role of spouse". Under the new law, a MARS "shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement." The new law also provides that, under regulations to be promulgated by the State Welfare Department, the MARS and the mother will be required to present the department with "all of the facts in connection with the sharing of expenses * * *." According to the latest information available to HEW, the new law has not yet been applied to the State's administration of the AFDC program, and the date when this will occur is uncertain. HEW has not been apprised of the regulations which the State will promulgate to implement the new law.

ARGUMENT

INTRODUCTION AND SUMMARY

We believe that the regulations of the Secretary of Health, Education, and Welfare prohibiting reduction of AFDC assistance on account of the presence of a stepfather or MARS with no generally applicable parental obligation of support are fully consistent with the applicable section of the Social Security Act, 42 U.S.C. 602(a)(7). As the district court recognized, California's limitations upon federally assisted payments to children in homes where there is a step-

father or a MARS explicitly conflict with those regulations and must fail if they are valid. Accordingly, the decision below should be reversed, and it is unnecessary to reach the constitutional issues that the appellants also raise.[33]

Before reaching the specific question of the validity of the Secretary's regulations, however, it is appropriate to consider whether, in light of the obligations imposed on him by California law, a MARS or non-adopting stepfather is a "parent" within the meaning of 42 U.S.C. 606(a)(1). For if he is such a "parent", his presence in the home would mean that the child is not deprived of support "by reason of the death, continued absence from the home, or * * * incapacity

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[33] The recent amendment of the California law with respect to families having a MARS does not render the questions in this case moot. (See pp. 14–15, *supra*.) The law as to stepfathers is unchanged, and the claims for back payments in this case call into question the validity of the prior California law as to MARS.

Wrongfully withheld back payments are recoverable under State law. California Welfare and Institutions Code, Section 10961 provides that a decision by the Director of the County Welfare Department, made after a hearing, favorable to the applicant, requires the Director to

> pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto * * *.

See *Board of Social Welfare* v. *County of Los Angeles*, 27 Cal. 2d 81, 162 P. 2d 630.

Accordingly, the discussion in this brief will relate to the California statute as it read prior to the recent amendment.

of a parent" within the meaning of that statutory provision. And, as this Court said in *King* v. *Smith*, 392 U.S. 309, 313, "[u]nder this provision, * * * [AFDC] aid can be granted only if a 'parent' of the needy child is continually absent from the home." If the MARS or stepfather is a "parent", therefore, the federal statute itself would preclude any federal matching assistance under the AFDC program for children living with a MARS or stepfather," and the plaintiffs here would have no rights under the Act.

1. In urging that the MARS or stepfather should not be deemed a "parent" within the meaning of the federal Act, we note, first, that the obligation of support which California law purports to impose on a MARS or non-adopting stepfather arises if, and only if, a child of the woman with whom he is living would otherwise be entitled to AFDC assistance—and that the MARS or stepfather can extinguish any such obligation merely by leaving the woman's home. Both the Social Security Act itself and this Court's interpretation of it in *King* v. *Smith*, 392 U.S. 309, indicate, we submit, that such an "obligation" does not make a man a "parent" for AFDC purposes. Rather he would have to have a full parental obligation to

[31] This would be so unless there were factors not relevant here, such as disability or unemployment. See *King* v. *Smith*, *supra*, 392 U.S. at 313, n. 7. The resulting disqualification would, of course, go much further than the California law, which does not treat such children as ineligible for AFDC benefits, but merely reduces payments to them on the basis of presumed support by the MARS or stepfather. And California would then not be allowed federal matching funds for any payments that it made to such children.

support the child which would be of general applicability and which would continue to exist if he were to leave the home.

It is, accordingly, unnecessary for this Court to decide whether the limited obligation of support purportedly imposed on the MARS and the stepfather is an actual, enforceable obligation. In fact, however, California court decisions and administrative practice indicate that this purported obligation is not legally enforceable by or on behalf of the child; the result is that a child is denied AFDC benefits because of a purported right to support that is not really guaranteed him.

2. The Secretary's regulations prohibiting reduction of AFDC payments on the basis of income presumed to be, but not in fact, available to an AFDC family, implement, rather than conflict with, the statutory requirement to "take into consideration any other income and resources of any child or relative claiming" AFDC benefits. This Court has so held by its summary affirmance in *Shapiro* v. *Solman*, 396 U.S. 5, and so stated expressly in *King* v. *Smith*, *supra*, 392 U.S. at 319, n. 16.

I. A "MARS" OR NON-ADOPTING STEPFATHER IS NOT A "PARENT" WITHIN THE MEANING OF 42 U.S.C. 606 (a)(1)

1. The California AFDC statute provides that a MARS or stepfather is "bound to support * * * his wife's children if without support from such step-

father or adult male person they would be needy children eligible for" AFDC assistance. California Welfare and Institutions Code, Section 11351. If, however, the children are needy but otherwise ineligible for assistance,[35] or if the children are not needy within the meaning of the welfare laws but would, if they were the adopted children of a father of like economic status, be entitled to more actual support than is provided by the AFDC program, the MARS' or stepfather's obligation vanishes. Moreover, the MARS' obligation exists only so long as he "*is in or around the home* and is maintaining an intimate relationship with the mother", California Manual, 42-515.4(.411) (emphasis supplied); and the stepfather's obligation exists only "when his wife and her children *are living in the home with him* * * *", California Manual, 42-513.5(.54) (emphasis supplied).

It is this obligation—tailored specifically to the AFDC program, and avoidable merely by leaving the home—which California claims has the effect of making a MARS or stepfather a Section 406(a) "parent" under federal law (Motion to Affirm at 7-8). We submit, however, that such an obligation—even if it is assumed to be enforceable rather than illusory (see *infra*, pp. 23-27)—does not render the MARS or stepfather a "parent" within the meaning of the federal law.

King v. *Smith*, 392 U.S. 309, dealt with an Alabama regulation purporting to disqualify from AFDC ben-

[35] For example, a child may be ineligible by reason of age. See, also, pp. 31-33, *infra*.

efits any child of a woman who cohabits inside or outside her home with a single or married able-bodied man. The specific question before this Court was whether such a man, denominated by Alabama as a "substitute father", could be deemed a "parent" within the meaning of 42 U.S.C. 606(a)(1):

> The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child. The State correctly observes that the fact that the man in question does not actually support the child cannot be determinative, because a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance. On the question whether the man must be legally obligated to provide support before he can be regarded as the child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term "parent" an individual who owed to the child a state-imposed legal duty of support [392 U.S. at 329.]

Thus the issue here is whether California imposes upon a MARS or stepfather the type of "state-imposed legal duty of support" referred to in *King*.

In rejecting Alabama's contention that a "substitute father" was a "parent", this Court examined the legislative history of the Social Security Act, which it

found to manifest a congressional intent to meet, through the AFDC program, a "need unmet by programs providing employment for breadwinners". As the Court stated (392 U.S. at 328–329):

> * * * It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children." H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a "breadwinner," "wage earner," or "father," as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word "parent." 49 Stat. 629, as amended, 42 U.S.C. § 606(a). [Footnotes omitted.]

It was in the framework of this legislative purpose that the Court then held that the Alabama "substitute father" was not to be regarded as a "parent" for AFDC eligibility purposes. The Court observed (*id.* at 329):

> It is clear, as we have noted, that Congress expected "breadwinners" who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother

> would benefit the mother's children whom he was not obligated to support.

In short, in finding determinative the absence of any legal obligation upon the part of the "substitute father" to support the child, the Court in *King* emphasized that the key purpose of the AFDC program is to provide economic security for children which could not reasonably be expected to be provided by programs designed to secure employment for "family breadwinners."

In this context, the "state-imposed legal duty of support" referred to in *King* is, we believe, the support duty of general applicability owing to a child from his natural or adoptive parent, not the kind of very limited "duty" California has imposed upon a MARS and a non-adopting stepfather. That this is so is demonstrated by the additional support for its conclusion which the Court found in *King* by reference to other provisions of the Act. 392 U.S. at 330–332. The Court pointed out that the term "parent" is used elsewhere in the AFDC provisions in contexts emphasizing full parental support obligations and that the statutory scheme takes great pains to ensure that efforts will be made to enforce those obligations against "parents" who have left the home. The Court concluded (392 U.S. at 332):

> The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child. The underlying policy and consistency in statutory

> interpretation dictate that the "parent" referred to in these statutory provisions is the same parent as that in § 406(a). The provisions seek to secure parental support in lieu of AFDC support for dependent children. Such parental support can be secured only where the parent is under a state-imposed legal duty to support the child. * * * [Footnote omitted.]

The *King* opinion thus indicates that an individual cannot be considered a Section 406(a) "parent" unless he owes to the children of the family in which he is living the type of state-imposed duty of support required of an actual or adoptive parent, *viz.* a duty of general applicability which he could be compelled by court order to fulfill even after he has deserted or abandoned the household and regardless of whether the children would otherwise receive AFDC payments. The duty California imposes upon a MARS and a stepfather hardly qualifies as such.

Indeed, California appears to recognize that this is so. For, as previously noted, under the State statute and implementing regulations the presence of a MARS or a stepfather in a needy home does not strip the child of eligibility for AFDC benefits as a "dependent child", but merely has the possible effect of reducing the amount of those benefits (albeit to zero in some cases).

2. The foregoing argument assumes that there exists an actual and enforceable, if severely limited, obligation of support imposed by California on the MARS and the non-adopting stepfather. The relevant judicial and executive interpretations of the State

law indicate, however, that this assumption is not justified, because the purported "obligation" is not legally enforceable against either a MARS or a non-adopting stepfather.

In *People* v. *Rozell,* 212 Cal. App. 2d 875, 878, 28 Cal. Rptr. 478, 480–481, the court rejected a contention that Section 11351 (imposing the "obligation")

> is unconstitutional in that it takes property without notice and hearing and is a denial of due process of law in that it deprives [a MARS] of his property. * * * The statute does not deprive the adult male of his property. It merely states in the portion with which we are concerned that if an adult male assumes the role of a spouse his income shall be taken into consideration in determining the amount of the grant. The purpose of such regulation or enactment is to administer the program fairly and to safeguard public funds. It is a reasonable device to determine the needs of a child. It is based on the assumption that a man assuming the role of a spouse will contribute to the support of the mother and her children. *It takes nothing from him. It merely requires that his income be considered.* * * * [Emphasis supplied.]

To the same effect, see *County of Kern* v. *Coley,* 229 Cal. App. 2d 172, 40 Cal. Rptr. 53. Cf. *People* v. *Shirley,* 55 Cal. 2d 521, 11 Cal. Rptr. 537, 360 P. 2d 33. And in an opinion of the Attorney General of California, *People* v. *Shirley, supra* and *People* v. *Rozell, supra,* were cited as authority that a MARS is a man "* * * 'who has no legal obligation to sup-

port the child, and who may, in fact, legally refuse to do so.'" 44 Op. Atty. Gen. Calif. 155, 157, Opinion No. 64–63, quoting from *People* v. *Shirley,* 55 Cal. 2d at 527, 11 Cal. Rptr. at 540, 360 P. 2d at 36 (dissenting opinion).

Similarly, *People* v. *Owens,* 231 Cal. App. 2d 691, 42 Cal. Rptr. 153, held that the present Section 11351 does not require a non-adopting stepfather to support his wife's children, but instead serves only to reduce the amount of welfare benefits received by the needy family. The stepfather had contended that the county welfare department's budgeting formula, which considered his income in determining the amount of assistance to which the family was entitled, contravened the provision of Section 209 of the California Civil Code that a "husband is not bound to maintain his wife's children by a former husband * * *." In rejecting this contention, the court quoted with approval from *People* v. *Rozell, supra,* and then stated (231 Cal. App. 2d at 697, 42 Cal. Rptr. at 157) (emphasis supplied):

> In the present case, the budgeting formula which merely took [the stepfather's] income into consideration in determining the needs of his stepchildren *neither deprived him of said income nor required him,* contrary to Civil Code, section 209, *to support those children.*

The foregoing decisions reflect the apparent fact that there is no provision of California law which would permit either the mother, the children or the State to enforce civilly the purported obligation of the

MARS or non-adopting stepfather. Section 11351 provides no right of enforcement against either a stepfather or a MARS, and Section 209 of the California Civil Code expressly provides that a "husband is not bound to maintain his wife's children by a former husband * * *." By contrast, Section 196a of the California Civil Code provides that, with respect to illegitimate children, "[a] civil suit to enforce" parental "obligations may be maintained in behalf of a minor illegitimate child" by certain named persons. And with respect to legitimate children, Section 137.1 of the California Civil Code provides that a parent "may maintain an action" against the other parent "for the support, maintenance and education" of the child. There is, moreover, a statutory right of action by county supervisors against the estate of a deceased parent if the county is chargeable for the child's support. California Civil Code, Section 205.

This contrast between the statutory rights of enforcement against an actual parent, and the lack of such rights with respect to a non-adopting stepfather or MARS, suggests that the California legislature did not intend to make the purported obligation enforceable. At least, the administration of the law by California officials has been consistent with that view. For, in contrast to the number of reported decisions affirming the criminal convictions of recipients of welfare benefits,[36] we are unable to find any reported decision in which State welfare officials (or a mother

[36] See generally Note, *Defense in Welfare Fraud*, 5 San Diego L. Rev. 83 (1968).

or children) have instituted a civil action to enforce the MARS' or the non-adopting stepfather's purported "obligation". In other words, insofar as the matter can be determined from the State's judicial decisions, Section 11351 (which even theoretically promises the children nothing more than they would otherwise be entitled to under the AFDC program) has served only to lessen support for needy children by depriving them of AFDC payments on the unenforced assumption that the MARS or stepfather is meeting their needs.

3. The decision below, if permitted to stand, would thus point the way by which this Court's decision in *King* could readily be circumvented. By the simple expedient of declaring in a statute that a mother's paramour owed to her children a legal (though wholly unenforceable and illusory) obligation of support, Alabama (or any other State) could strip those children of eligibility for AFDC benefits, thus accomplishing precisely the result which this Court determined in *King* to be forbidden.

In sum, therefore, we submit that a MARS or a non-adopting stepfather in California is not a "parent" within the meaning of 42 U.S.C. 606(a), as interpreted by this Court in *King*, and his presence in the home is not in itself a justifiable basis for denial by the State of AFDC assistance to needy children.

II. THE SECRETARY'S REGULATIONS PROHIBITING A PRESUMPTION OF SUPPORT IN THESE CASES ARE VALID, AS THIS COURT HAS PREVIOUSLY HELD

We reach, then, the question whether the Social Security Act forbids the Secretary's regulations providing that only actual contributions by a nonparent may be taken into account in determining the need of a dependent child.

1. In contrast to the court below, we believe that this Court in *King* definitively resolved this question in favor of the regulations. Pointing to the fact that it was undisputed that "regular and actual" contributions to the child by the Alabama "substitute father" could be taken into account in determining whether the child was needy, the Court stated in a footnote (392 U.S. at 319, n. 16):

> Indeed, the Act requires that in determining need the state agency "shall * * * take into consideration any other income and resources of any child or relative claiming aid to families with dependent children * * *." 42 U.S.C. § 602(a)(7) (1964 ed., Supp. II). Regulations of HEW, *which clearly comport with the statute,* restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis * * *." This regulation *properly* excludes from consideration resources which are merely assumed to be available to the needy individual. Handbook, pt. IV, § 3131(7). See also §§ 3120, 3123, 3124, 3131(10), and 3131(11). [Emphasis supplied.]

As previously noted (*supra*, p. 5 & n. 4), the general regulation there adverted to by the Court is still in effect (with slightly altered wording). Its terms prohibit the State practices at issue here, even in the absence of the more detailed supplementary regulation (45 C.F.R. 203.1; see *supra*, pp. 6–7) specifically declared invalid by the court below. Moreover, application of the supplemental regulation to invalidate a Connecticut practice similar to California's was recently upheld summarily by this Court. *Shapiro* v. *Solman*, 396 U.S. 5 (in which the appellant urged the Court in its jurisdictional statement, p. 9, to invalidate 45 C.F.R. 203.1 "by following the same rationale" as the court below in the present cases).

This Court's statement in *King* and decision in *Shapiro* v. *Solman*, *supra*, accurately reflect the congressional intent. 42 U.S.C. 602(a)(7) was added to the Act, in essentially its present form, in 1939 (53 Stat. 1360). In commenting contemporaneously on the corresponding provision under the old-age assistance program, the congressional committee which considered this legislation stated:

> This will make it clear that, regardless of its nature or source, any income or resources will have to be considered, including ordinary income from business or private sources, Federal benefit insurance payments under title II of the Social Security Act, and any other assets or means of support. The committee recommends this change to provide greater assurance that the limited amounts available for old-age assistance in the States will be distributed only among those actually in need and on as equitable a basis as pos-

sible. [H. Rep. No. 278, 76th Cong., 1st Sess., p. 32; S. Rep. No. 734, 76th Cong., 1st Sess., p. 40.]

Thus, the manifest function of 42 U.S.C. 602(a)(7) is to insure that the limited supply of funds available for AFDC purposes will not go to persons not "actually in need." Its purpose is not to permit the deprivation of benefits to needy individuals on the basis of income and resources merely assumed to be available to them. By specifying in 45 C.F.R. 203.1 that the States are prohibited in the circumstances of the present cases from reducing AFDC assistance to the needy on the basis of income which is not actually available to them, the Secretary was validly exercising his delegated power to issue "rules and regulations * * * not inconsistent with" the Act. 42 U.S.C. 1302.

Indeed, the Secretary's regulation is not only not inconsistent with the Act, but is required by it. For 42 U.S.C. 602(a)(9) specifies that State plans provide that AFDC assistance "shall be furnished with reasonable promptness to all eligible individuals". An eligible needy child, who does not actually receive income and resources assumed to be available to him, remains needy. States which reduce benefits on the basis of presumed support from a non-parent are not furnishing AFDC assistance to "all eligible individuals". And the directive of 42 U.S.C. 602(a)(7) that "the State agency shall * * * take into consideration any other income and resources" of the needy child, on which the court below relied, implies, conversely,

that the State should not rely on what are in fact non-income and non-resources." Certainly, an unenforceable "obligation" of support created only for the purpose of minimizing AFDC payments (see pp. 23–27, *supra*) cannot fairly be considered even a potential source of income or resource of a needy child.

2. There is no support for the district court's further view (App. 41)—reasserted in this Court by the appellees (Motion to Affirm, pp. 8–9)—that the Secretary's regulation improperly intrudes upon the State's prerogative under the Act of determining the standard of need for eligible individuals. The Secretary's regulation infringes upon neither the State's determination of the standard of need, nor its discretion to pay all or a percentage of need thus determined. See *supra*, p. 4. The regulation simply directs that once a State determines the level of benefits to which needy individuals are entitled, it may not reduce that level by assuming income which is not actually available.

3. The appellees have further argued (Motion to Affirm, pp. 4–8) that the 1967 amendment to 42 U.S.C. 602(a)(7) codifying the Secretary's longstanding "essential person" policy somehow gives added justi-

" Moreover, when Congress amended 42 U.S.C. 602(a)(7) in 1967 (81 Stat. 821), after thorough study, it made the income and resources clause of that provision explicitly applicable to the "essential person", see pp. 31–33, *infra*, leaving it unchanged insofar as it applied to children and relatives claiming AFDC. This occurred after the Secretary had issued his general regulation prohibiting the presumption of income.

fication for a presumption of support by a MARS or stepfather. This policy permits a State to include in the family budget unit, for calculation of need, any additional person (other than the dependent children and the relative with whom they live) whose presence is deemed essential to the well-being of the recipients of assistance.[35] Thus, for example, an AFDC mother with several children may be permitted—if but only if she so desires—to include in the family budget unit a child too old to receive benefits whose continued presence in the home is essential to the well-being of the eligible younger children. A condition of the inclusion of the needs of such an "essential person" is the in-

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[35] The language added to 42 U.S.C. 602(a)(7) is italicized below:

"A State plan * * * must * * * (7) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid*, as well as any expenses reasonably attributable to the earning of any such income; * * *."

The Committee on Ways and Means, where this amendment originated, reported that the amended provision "makes no change in present law." H. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967). See, also, *Solman* v. *Shapiro*, 300 F. Supp. 409, 414–415 (D. Conn.), affirmed, 396 U.S. 5.

HEW's "essential person" policy was established by regulation in HEW Handbook of Public Assistance Administration, pt. IV, § 3131(4), which has now been published at 34 Fed. Reg. 1394 (45 C.F.R. 233.20(a)(2)(vi)). The policy is explained in detail in a letter dated December 13, 1968, to Mr. Thomas K. Gilhool from Alanson W. Willcox, then HEW General Counsel, reproduced at A. 52–59.

clusion also of his income. But this condition is no justification for the wholly different proposition—asserted by the appellees—that the income of a MARS or stepfather must also be included. None of the appellants has sought to have such a man included in the family budget unit, and indeed they could not under the applicable California regulations.[39] Thus, there is nothing in the Social Security Act indicating that the Secretary's regulations are invalid and must yield to conflicting State practices.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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[39] California Manual Section 42-535.2(.22) excludes any MARS from the family budget unit. Under Section 44-213.1 (.11(.111)) the stepfather is included in the family budget unit when he is needy, *i.e.*, when the amount of assistance to which he is entitled is greater than the amount of income he is assumed to have contributed to the family. When, however, the stepfather is not needy, Section 44-213.2(.31) excludes him from the family budget unit.

APPENDIX

Statutory and Regulatory Provisions Involved

42 U.S.C 602(a)(7) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must * * * (7) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income[.]

42 U.S.C. 602(a)(10) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must * * * (10) provide * * * that * * * aid to families with dependent children * * * shall be furnished with reasonable promptness to all eligible individuals[.]

42 U.S.C. 606(a) provides in pertinent part:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, * * *.

California Welfare and Institutions Code, Section 11351 provided (until November 1969):

> COMPUTATION OF AID; STEPFATHER'S INCOME; SUPPORT BY STEPFATHER.
>
> Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.
>
> Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.
>
> A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their step father by this section.
>
> As used in this section, "adult male person" means any male person of age 18 years or older.

California Welfare and Institutions Code, Section 11351.5 (enacted in September 1969) provides:

CONTRIBUTION OF UNRELATED ADULT MALE RESIDING WITH FAMILY APPLYING FOR OR RECEIVING AID.

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes into account such adult male person's income and expenses. The regulations formulated by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person willfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all of the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer, or boarder living in the home of a family applying for or receiving aid under this chapter.

45 C.F.R. 203.1 (33 Fed. Reg. 11290) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children * * * must provide that the determination whether a child has been deprived of parental support or care by reason

> of the death, continued absence from the home, or physical or mental incapacity of a parent * * * will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.
>
> (b) The inclusion in the family, or the presence in the home of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. * * * [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

45 C.F.R. 233.20(a)(3) (34 Fed. Reg. 1394, *et seq.*) provides in pertinent part:

> (a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below: * * *
>
> (3) * * *
>
> (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: * * * (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; * * *.

* * * * *

(vi) * * * In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

California State Department of Social Welfare, Public Social Services Manual, provides in pertinent part:

42–515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

* * * * *

.4 *Man Assuming the Role of Spouse*

.41 *Definition.*—A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

* * * * *

44–133.5 TREATMENT OF INCOME OF MAN ASSUMING THE ROLE OF SPOUSE

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, *et al.*,

Appellants,

—against—

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, THE ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WELFARE RIGHTS ORGANIZATION, AND THE STATE OFFICE OF LEGAL SERVICES

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Movants Center on Social Welfare Policy and Law, The Roger Baldwin Foundation, The National Welfare Rights Organization and State Office of Legal Services respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

1. The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Columbia University School of Law, the Center undertakes research pertaining to the legal rights of welfare recipients and supports OEO-funded legal services

programs and other legal organizations through education and assistance in the preparation of important litigation. In this capacity the Center has rendered substantial assistance in most of the cases challenging substitute father rules found in public assistance statutes and regulations. The Center filed an *amicus* brief with the District Court on Appellants' unsuccessful motion for a rehearing. The Center has also appeared before this Court in two arguments this term (*Goldberg* v. *Kelly*, No. 62, and *Rosado* v. *Wyman*, No. 540) and has submitted briefs *amici curiae* in *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Simmons* v. *Housing Authority of West Haven*, O.T. 1969, No. 81; *Boddie* v. *Connecticut*, O.T. 1969, No. 265; *Sanks* v. *Georgia*, O.T. 1969, No. 266; *Wheeler* v. *Montgomery*, O.T. 1969, No. 14; and *Dandridge* v. *Williams*, O.T. 1969, No. 131. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. The Center, together with the federally funded legal services programs throughout the nation, has a vital interest in presenting to this Court the full range of issues raised and rules affected by this case.

2. The Roger Baldwin Foundation of the American Civil Liberties Union is a non-profit organization devoted to the furtherance of civil liberties and civil rights in all aspects of American life. The transformation of constitutional guarantees of free speech, rational classification, and due process into meaningful protection to needy persons dependent upon the State for their support has been a particular concern of the Foundation and led to its participation as counsel of record in *King* v. *Smith*. The Foundation's concern that has led to its participation in this brief is the

result of the use of rules, such as California's, the effect of which is to circumvent *King* v. *Smith*.

3. The National Welfare Rights Organization was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of the National Welfare Rights Organization includes more than 30,000 households organized in 200 affiliated groups in 70 communities in 37 states. Since many of its members have been and continue to be adversely affected by arbitrary income assumption rules, which are contrary to the reality or existence of such income, the organization has devoted much of its energies and resources to the abolition of such arbitrary rules.

4. State Office of Legal Services is the State-wide Appeals Division of Legal Service Programs in the State of New Jersey who have the responsibility of coordinating efforts of the local legal services offices in appealing cases which challenge policies or statutes that adversely affect the poor in the State of New Jersey. The outcome of the instant appeal will have a direct effect upon the applicable statute in New Jersey (see Appendix).

5. Counsel for Appellees, though not having any objection to the filing of this brief *amici curiae*, expressed a preference for this brief to be presented to this Court by Motion as opposed to Stipulation.

6. *Amici* wish to present to the Court, in the interest of providing as complete and relevant a discussion of the very

important issues here (in view of the impact on the financial security of thousands of recipients and applicants around the country), further amplification of the statutory argument discussed in Appellants' brief. Appellants' development and argument of the due process and equal protection Constitutional issues involved in this appeal are competently and fully discussed in their brief and therefore this brief is limited to the statutory issue. To avoid repetition we shall attempt to omit arguments raised in Appellants' brief and the United States Government's *amicus* brief filed with the Court.

WHEREFORE, Movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

ARGUMENT

I.

A state may not assume contrary to fact that a non-parent is supporting a needy dependent child and thereupon deny, terminate or reduce aid.

Title IV of the Social Security Act, 42 U.S.C. §601, establishes two basic eligibility criteria for determining whether a child qualifies for Aid to Families with Dependent Children (AFDC) benefits: 1) Is the child "needy" and 2) is the child "dependent," i.e., "deprived of parental support

or care by reason of the death, continued absence from the home, or physical or mental incapacity of the parent." 42 U.S.C. §606.

State-imposed restrictive definitions of these two terms have caused otherwise needy dependent children to be declared ineligible for, or to have their benefits reduced or denied under AFDC. Alabama's definition of "dependency" was at issue in *King* v. *Smith*, 392 U.S. 309 (1968). Alabama law declared ineligible for AFDC benefits children whose mother cohabited with any able-bodied man. Reasoning that such a man was a "substitute father" within the meaning of the federal statute, Alabama denied any aid to a child in such a home since it lacked an absent "parent" and therefore the child was not "dependent." This Court rejected this analysis and noted that under Alabama law a "substitute father" was not among those legally obligated to support the child.

The Court went on:

> The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: 1) that the man did not in fact support the child; and 2) that he was not legally obligated to support the child . . . We think the answer is quite clear; Congress must have meant by the term "parent" an individual who owed to the child a state imposed legal duty of support. 392 U.S. at 329.

After *King* v. *Smith* was decided, the Department of Health, Education and Welfare (HEW), the federal agency

responsible for administering[1] the Social Security Act, issued a regulation[2] implementing the decision in *Smith*. The regulation required, in order for a state plan to be in conformity with the Act, that only income or resources of men-living-in-the-house in fact available on a regular basis may be taken into consideration in determining the budgetary needs of eligible children. California admittedly is not in conformity with this regulation.[3]

"Need," on the other hand, was at issue in *Solman* v. *Shapiro*,[4] and is at issue in the instant appeal. "Need," for purposes of determining both eligibility and the amount of benefits, is derived by subtracting currently available income and resources from the state-determined standard of need. In determining the amount of resources available, both Connecticut and California indulge in an irrebuttable presumption, often contrary to fact, that a stepparent

---

[1] 42 U.S.C. §1102.

[2] 45 C.F.R. §203.1(b), which reads in pertinent part:

> "The inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in paragraph (a) [natural or adoptive parent or stepparent who is legally obligated to support the child under State law of general applicability] of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. • • • In the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.*" [Emphasis added.]

[3] See Memorandum Opinion of District Court in Appellants' Jurisdictional Statement, Appendix A.

[4] 300 F. Supp. 409 (D. Conn. 1969), *affirmed per curiam*, —— U.S. ——, 38 U.S.L.W. 3125 (No. 215, Oct. 14, 1969).

(and in the case of California, an unrelated male) present in the home of a child is contributing regularly and adequately to the support of that child. Thus, in determining need, the pertinent Connecticut statute required that "the income of a stepparent shall be considered as available for the support of the . . . stepchild," even though not in fact so available and even though Connecticut does not have a state law of general applicability imposing an obligation on a stepfather to support his minor stepchildren. The three-judge district court in holding that Connecticut's statute clearly contravened the federal regulation against assumption of income noted that the stepfather is neither a "relative claiming aid"[5] nor an "essential person"[6] and that the stepfather is not a "parent"[7] since he is neither the natural or adopting father nor does he have an obligation of general applicability under Connecticut law to support his minor stepchildren, 300 F. Supp. at p. 415. Rather, he was one of those persons whose income could not be assumed to be available to the child under valid federal regulations.

California's approach to determining "need" of admittedly "dependent" children is similar to Connecticut's. California seeks to distinguish its approach from Connecticut's on the basis of a statute,[8] which establishes a

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[5] 42 U.S.C. §602(a)(7). This is because he is not the caretaker of the needy child, and, of course, a stepparent or MARS is not eligible for assistance in his own right under AFDC.

[6] *Ibid.*—As developed *infra*, an "essential person," must consent to being included in the family budget since the state includes his income in determining the needs of the total family.

[7] 45 C.F.R. §203.1(a).

[8] California Welfare & Institutions Code Section 11351, set forth in the Appendix. On November 10, 1969, §11351.5 became effective,

"welfare" obligation on stepparents and unrelated males assuming the role of a spouse (MARS) to support their stepchildren or the children of the woman living in the house.[9] In effect, California is determining when a child is deprived of parental support with reference to its own special rules of legal obligation to support, applicable only to "substitute parents" of AFDC families. But if a state may do this, then it has license to define and redefine "parent" as that term is used in the Social Security Act. That is to say, the *sine qua non* for eligibility for AFDC is the deprivation of the support of a "parent." Were "parent" to mean any legal obligation to support and include the special legal obligations involved herein, the requirements of the Social Security Act spelled out so carefully in *King* v. *Smith* would be illusory. Under this reasoning Alabama's fault in *Smith* and Connecticut's fault in *Solman* were merely the technical failure to impose its own legal obligation of support on those whom it deemed to be substitute fathers of AFDC children. Surely the economic protection of needy dependent children cannot be so easily avoided. California's approach represents the classical distinction without a difference since the statute is not enforced,[10] nor could it be enforced against the step-

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purporting to treat man-assuming-the-role-of-spouse (MARS) in a different manner than stepparents. New regulations have been proposed pursuant to the new statute, but not implemented, and the old regulations implementing §11351 are still being applied to MARS. §11351 continues to apply to stepparents without change. See Appellants' Brief, Appendix H.

[9] In California, §11351 stepparent and §11351.5 MARS obligation is triggered only if the child seeks welfare.

[10] Rosen, *Enforcement of California's Man-Assuming-the-Role-of-Spouse* Statute: Empirical Findings (May 1969) (printed in Sparer, *Materials on Public Assistance Law*, Univ. of Penn. L.

parent or MARS for the benefit of the family.[11] But assuming, *arguendo,* that California's statute does establish an enforceable legal obligation of support, it is the contention of *Amici* that the statute is impermissible because *King* v. *Smith* and *Solman* v. *Shapiro* are controlling and, in addition, the statute violates valid HEW regulations, issued by the federal agency responsible for ensuring proper compliance with the Act and safeguarding and effectuating the rights of recipients.

II.

There are three classifications of persons living in the home, only one of which, a "parent," has the characteristic of assumption of income.

To fully understand how California's approach visits needy, dependent children with the same kind of vengeance as the impermissible approaches taken by Alabama and

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Sch., Reginald Heber Smith Community Lawyer Fellowship Program (unpublished, summer 1969), v. 1, pp. 5-132 to 5-143; a study conducted by Yale Law Journal in March 1968 in which the ten California counties with the largest welfare populations indicated it was *not* their practice to enforce §11351 against the MARS for the benefit of needy children by use of court action, but relied upon the threat of or prosecution through the welfare fraud statutes.

[11] In an increasingly mobile and transitory society of which California represents a prominent example, the mere removal of the MARS from the relationship in the house would make the legal obligation of support unenforceable. See also *People* v. *Owens,* 231 Cal. App. 2d 691, 697, 42 Cal. Reptr. 153, 157 (1965) which expressly held that a non-adopting stepfather was not required by §11351 of the Welfare & Institution Code and regulations promulgated thereunder to support his stepchildren.

Connecticut, thereby denying the economic protection of such children as required by the Act, it is important to identify 1) who is and who is not a "parent" under the Act, and 2) under what circumstances income may be "assumed" to be available.

"Parent" in 602(a) and in other sections of the Act refers only to a natural or adoptive parent or a stepparent who is legally obligated to support the child under a state law of general applicability,[12] 45 C.F.R. §203.1(a), *King* v. *Smith*, 392 U.S. at 329. The reason Congress limited the category "parent" to those who have a well recognized, full-fledged and stable obligation to support and, in addition, have the natural or voluntary bond of affection to so support such children, is not hard to find. As this Court developed in detail in *King* v. *Smith*, Congress in establishing the AFDC category was distinguishing between two groups of needy children—those whose need arises from the unemployment of a "parent" (and referred to as a "breadwinner," "wage earner," or "father"), and those whose need arises from the absence, death, or incapacity of the "breadwinner," "wage earner" or "father." Only the needs of the latter group, characterized in the original house report as "one clearly distinguishable group of children," H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935), and in the Act as "dependent" children, were to be relieved under the AFDC program; the needs of the former, representing a stable family, would be met by employment programs for fathers. As the court further said in *King* v. *Smith, supra*, "to describe the sort of 'bread-

[12] General applicability refers to the enforceable obligation and duty of a stepparent to support his stepchildren in non-welfare as well as welfare situations.

winner' [Congress] had in mind, [it] employed the term 'parent.'" *King* v. *Smith*, 392 U.S. at 328, 329.

The use of the term "parent" in other sections of the Act makes even clearer the narrow definition of "parent." Thus Section 402(a)(10), enacted in 1951, requires a state to provide prompt notice to law enforcement officials "in respect of a child who has been deserted or abandoned by a 'parent.'" 42 U.S.C. §602(a)(10). The "parent" whom this provision requires to be reported to law enforcement officials is surely the same parent whose desertion makes a child eligible for AFDC assistance in the first place. And Congress obviously did not intend that a so-called "parent" who has no legal duties of support, *Smith*, at 330, 331, beyond a supposed obligation to the children of others while cohabiting [but not afterwards] was to be referred to law enforcement officials. MARS and stepparents are simply not deserting or abandoning parents, as those terms are commonly understood, for the very purpose of such referrals is to institute non-support proceedings.[13] See HEW Handbook of Public Assistance Administration (Handbook) Pt. IV, §§8100-8149. Similarly, the 1967 Amendments to the Social Security Act provide that as

[13] The long-standing reality under the laws of forty-nine states and the District of Columbia is that only natural and adopting fathers have a legal obligation and general duty of support of their children. The various states that have special so-called legal obligations to support of stepparents and substitute fathers were developed since the Act of 1935 and are found only in the welfare law of such states as an exception to their general applicable support laws. Thus California's so-called obligation to support of stepfathers and MARS is an exception to its domestic relations law, Calif. Civil Code Section 209.

The State of Washington passed Section 26.16.205 of the Domestic Relations Statute in 1969 imposing a general duty of support on stepparents, whether living in or out of the home, of their stepchildren, as long as they are married to the mother.

regards any child receiving aid who has been deserted or abandoned "by his parent," the states must establish a program to secure support for such child from such parent. 42 U.S.C. §602(a)(17). Also, states are required to report to HEW any "parent . . . against whom an order for the support and maintenance of such [dependent] child . . . has been issued by" a court, if such parent is not making the required support payments. 42 U.S.C. §602(a)(21). Still another amendment requires the states to cooperate with HEW in locating any "parent" against whom a support petition has been filed in another state, and in securing compliance with any support order issued by another state. 42 U.S.C. §602(a)(22).

As the Court said in *Smith*, the "pattern of this legislation could not be clearer." 392 U.S., at 332. The provisions seek to secure "parental" support in lieu of AFDC support for dependent children. Children with alleged substitute parents not actually subject or subjected to judicial support orders are entirely unprotected by these provisions. *Ibid.*

To be distinguished from "parent" is the classification "essential person." Although the Act does not mention essential persons, it soon became apparent that the presence of certain persons in the home was advantageous or essential to the well-being of children furnished aid under the Act. Thus the Department formulated the long-standing[14] policy of permitting states to include, in computing the needs of a person eligible for assistance, the needs of another person (or persons) living in the same home

[14] HEW Handbook, Part IV, §3131(3), 1964, renumbered §3131(4) in 1965. See also Appellants' Jurisdictional Statement, Appendix H, last exhibit, Letter of Manson W. Wilcox, General Counsel's Office of the Department of Health, Education & Welfare, addressed to Thomas K. Gilhool.

whose presence was deemed essential to the well-being of the recipient. The presence of such a person (e.g., the older ineligible brother of a needy dependent child or a stepparent) was deemed to be so related to the welfare of the recipient that the financial cost of achieving the result was considered part of the recipient's need. Given the basis for this policy, the decision as to whether a person was essential or not was left to the applicant or recipient in the individual case. This administrative policy was expressly approved by Congress and incorporated into 42 U.S.C. §§602(a)(7) and (8) as a part of the 1967 amendments to the Social Security Act.

Also to be distinguished from "parent" are "other persons." 45 C.F.R. §203.1(b). Simply stated this refers to persons, including relatives, who might contribute to the family. To the extent that such persons do contribute, in fact, on a regular basis, such income must be taken into consideration by the Welfare Department in determining family need. *Ibid.*

Certain characteristics flow from these classifications, one of the most important being "assumption of income." HEW has a general policy against the assumption of income or resources (except those of a natural or adopting parent residing in the household). Under this policy it is the availability, in fact, of income, and not the possibility of obtaining it because it is said to legally exist, which is controlling. This policy finds expression in Section 3131(7) of Part IV of the HEW Handbook, in force since 1966, which provides that no income may be assumed or included in determining need unless it is "in fact, available . . . for current use on a regular basis." This Court gave approving reference to this regulation in *King* v. *Smith* when it found

that the regulation "properly excludes from consideration resources which are merely assumed to be available to the needy individual." 392 U.S. 309, 319, n. 16 (1968). Subsequent to *King* v. *Smith* as noted above, a more specific regulation was promulgated by HEW applicable to substitute fathers because various states refused to conform to HEW's general policy in this regard and had singled out these persons in applying their assumption of income statutes and regulations.[15]

One reason for the concern about assumption of income becomes apparent when viewed in the context of the purposes of the AFDC program: ". . . to help maintain and strengthen family life" and "furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living" (Social Security Act of 1935, §401, 42 U.S.C. §601). As this court made abundantly clear in *King* v. *Smith*, the overriding concern of the AFDC program was the economic security and well-being of dependent children deprived of the support of the parent. "Protection of such children is the paramount goal of AFDC" (392 U.S. 309, 325).

Thus, only a "parent" *living in the home* has his income "assumed" to be available to his children. Economic protection of needy children is consistent with allowing a state to assume the income when the "parent" is living in the home because there are present numerous safeguards to ensure this protection, including a state-imposed general legal duty of support, the natural or voluntary bond of affection between the parent (i.e., natural or adopting father) to so support his child, as well as en-

[15] *Ibid.*, Letter of Alanson W. Wilcox.

forceable and enforced civil and criminal sanctions should the support not be forthcoming.

In sum, Congress has consistently been concerned with ensuring meaningful protection to such class of children as demonstrated by a wide variety of provisions which include: that all persons have an opportunity to apply, so that aid be furnished promptly "to all eligible" children, 42 U.S.C. §602(a)(10); that a hearing be provided to challenge any denial or limitation of aid, 42 U.S.C. §602(a)(4); that the program be uniform throughout the state, 42 U.S.C. §602(a)(3) and that aid may not be denied children in unsuitable homes unless the state makes provision for them elsewhere, 42 U.S.C. §602(5).

The statutory theme could not be clearer: protection of needy children was not just a phrase, but a goal that, in order to be reached, required definitive avenues and boundaries. As a result of its many decades of administrative experience in this area, HEW has acquired the precise expertise necessary to define the appropriate avenues and boundaries required in order to ensure the implementation of Congressional intent.

III.

The HEW regulation restricting the assumption of income is a valid expression of broad rule making power necessary to implement congressional intent expressed in the Social Security Act.

As is noted in Point II, HEW has a strong policy against the assumption of income of a non-parent whether living in or out of the house. That this non-assumption of income rule is a proper exercise of rule-making authority under the Act and that the subject which it regulates goes to legitimate federal concern cannot be doubted. The statute requires a state agency in its state plan to take into consideration, "in determining need, any other income and resources of any child or relative claiming aid to families with dependent children," 42 U.S.C. §602(a)(7). This is the provision erroneously relied upon by the District Court below when it declared HEW's regulation and not California's statute had failed to conform to the Act. Plainly this provision commands consideration of *available* income and resources *of the child or relative* claiming aid, but, equally plainly, it does not command consideration of other income and resources *not* available to the child or relative. It is the "other income and resources *of* any child or relative which are to be considered. The statutory directive of §602(a)(7) on its face thus contemplates rules for determining when income and resources are *"of a child or relative."* Being a federal dictate imposing requirements of a State plan, the federal rules decreed are formulated by the agency charged with

the responsibility of approving and verifying compliance of State plans with the Federal statute.[16]

Thus, HEW's administrative experience under the AFDC program has resulted in specific prohibitions in order to provide the required economic security to needy children. A state may not include support payments of the natural father living outside the house, even where they are the subject of a court order, unless they are in fact made on a regular and continuous basis. Handbook, Pt. IV, §3120. The existence of a court order itself does not guarantee regular payments from an abandoning or deserting spouse, and HEW accordingly requires some other assurance, such as payment directly to the welfare department. Handbook, Pt. IV, §3124. Similarly, a state may not budget contributions from relatives generally, even where such persons have been determined able to make them, unless they are in fact made on a regular, continuing basis. Handbook, Pt. IV, §3120. This is true whether the relative is a person living in or outside the AFDC home and regardless of whether the relative is said to have a "welfare" obligation to support the child. Where the relative or other person with income is living in the same home as the recipient of AFDC, this policy is assured by the "essential person" doctrine, now statutory, which, as noted above, allows the needs and income of such person to be budgeted in the AFDC budget only where the recipient so selects or where the income

[16] See e.g. *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938) (a well established pattern of practice or administration bears a presumption of consistency with the governing statute). The words "income and resources *of a child* or relative" are "not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

is proven to be available. These rules of course do not render the states impotent to deal with the income of persons said to be liable for support. They merely specify the manner in which states must ascertain and obtain such income, at least as it affects needy children entitled to AFDC benefits. Thus another HEW regulation directs states to *develop* potential sources of revenue, such as OASDI benefits, but not to assume them. Handbook, Pt. IV, §3140.5. Under these rules states are quite free to pursue the income of anyone on whom they impose a legal obligation of support to defray welfare costs. Assumption is simply not the way to pursue the income.

The validity of the assumption of income and resources and the regulations implemented to restrict it, is a subject transcending state boundaries to be dealt with by HEW in light of national experience. Of course any restrictive rule on income saves money, but the states were not granted autonomy under the Social Security Act to conserve resources in any manner they saw fit. It is the use of federal money by the states in the service of federal goals which is controlling here. Plainly HEW may define the circumstances in which a state must establish the actual availability of income rather than assume it before deducting income from or denying outright a subsistence grant covering basic and fundamental needs of dependent children.

IV.

A stepparent or MARS in California is not a "parent" and his income may not be assumed to be available to needy children in the house unless it is, in fact, available.

As illustrated by California, some states treat stepparents and men in an AFDC household as "parents" or actual supporters of needy children, and all of their income, less a welfare budget for themselves and their own children, is deemed available to the AFDC family. But it was precisely this practice that HEW condemned in its specific regulation issued in the wake of *King* v. *Smith*. Specific expression by HEW of the general policy against assumption was necessary because, although there was little overt controversy over the rules governing assumption of income generally, the states could not resist different treatment of the man-in-the-house.[17] The reasons for this treatment are not hard to find: In the case of the MARS there is moral antipathy to his relationship with the mother; and there is an equally potent antipathy to allowing either a non-married or non-adopting male, thought to be enjoying the privileges of marriage or fatherhood without the concurrent obligations, to be in a better position regarding support than a natural or adopting father. And, of course, these restrictive definitions, like all such rules, reduce welfare costs.

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[17] At the time of *King* v. *Smith*, 12 states had budgetary (or assumption of income) rules, Pollock, 14 Welfare L. Bull. 19, 23 (Sept. 1968). At the present time, at least 7 states continue to use budgetary rules. See Appendix.

As developed above, California's budgetary treatment of stepparent and MARS income is defended by the existence of a special "welfare obligation" to support an AFDC family imposed on stepparent and MARS, but only as long as they cohabit with the family. It is said that this legal obligation to support, by itself, renders the income a resource of the children and relative claiming aid, notwithstanding that this is plainly inconsistent with the approach taken towards all other persons, including absent fathers and relatives with an obligation to support; and notwithstanding that this was contrary to the actual experiences of appellants that were ignored by the Welfare Department. A simple fact seemingly ignored by California is that appellants are not attempting to obtain welfare benefits in addition to money available from men-in-the-house. Whatever income the man-in-the-house possesses is simply not in fact available to the needy children.[18]

California's and the District Court's error arises from their confusion of "parent" as that term is used in §402(a) of the Social Security Act, 42 U.S.C. §602(a). Men-in-the-house, including stepparents and MARS, in California are

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[18] For other examples of statutory restrictions based on legal definitions having no basis in fact and depriving needy children of economic protection, see *Damico, et al.* v. *State of California et al.* (N.D. Calif., Sept. 12, 1969), 2 Pov. L. Rptr. ¶10,478 where a three-judge court held that a statute requiring a 90 day waiting period in order to determine a continued absence of a parent from the home, before a recipient could obtain AFDC benefits, was invalid as a violation of §406(a) of the Social Security Act; and *Anderson* v. *Burson*, 300 F. Supp. 401 (N.D. Ga., April 5, 1968) where a three-judge court required the State to carry the burden of showing there was suitable employment available and a bona fide job offer made to an AFDC mother when it declared inapposite Georgia's "employable mother" regulation which had placed the burden on the recipient to establish that employment is not available.

not "parents" under §602(a), even where there is a so-called welfare obligation to support. "Parent" in 602(a), as developed earlier, refers only to a natural or adopting parent or father, who has a well recognized, full-fledged and a stable obligation to support his children or a stepparent who is legally obligated to support the child under State law of general applicability.

In *King* v. *Smith*, this Court was dealing with a man having intimate relations with the mother in the house but who was without any form of legal obligation of support under Alabama law. Hence the Court at times used the term "parent" and legal obligation of support interchangeably, though it also stressed absence of support in fact. 392 U.S. 309, 319 n. 16. But, and this is crucial, *King* v. *Smith* does not say that any person or man said to be bound or obligated to support another's child was a "parent" within the Social Security Act. To so do would, as noted above, render the decision in *King* v. *Smith* illusory.

Just as the Court found in *Solman*, California's stepparents and MARS are neither natural or adoptive parents nor stepparents with an obligation, under a state law of general applicability, to support their stepchildren, but are "other persons" who have the *potential* to contribute to the needy family.

California's approach regarding the assumption of income differs from HEW's approach regarding the likelihood of the existence of such income. But California is not charged with the responsibility of administering the Social Security Act so as to carry out its purposes and ensure the economic security of needy children. HEW is, and has determined, through its three and a half decades

of experience, that California's approach is contrary to ensuring the economic security of needy dependent children.

CONCLUSION

The Court should hold that non-parent assumption of income statutes and regulations violate the Social Security Act and the Fourteenth Amendment and uphold the validity of 45 C.F.R. §203.1, the relevant federal regulation. The decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

I. CALIFORNIA WELFARE AND INSTITUTIONS CODE.

Section 11351 (stepparent)

Where a needy child lives with his mother and a stepfather • • • the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather • • • The county granting aid shall determine if the stepfather • • • is able to support the child either wholly or in part. *The determination shall be based upon a standard* which takes into account the stepfather's • • • income and expenses *under regulations adopted by the department.*

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather • • • is bound to support, if able to do so, his wife's children if without support from such stepfather • • • they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section • • •

Section 11351.5, effective Nov. 10, 1969 (MARS)

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribu-

tion to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance *with standards established by the department* which takes into account such adult male person's income and expenses. The regulations formulated by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person wilfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer or boarder living in the home of a family applying for or receiving aid under this chapter. (Emphasis added.)

II. OTHER STATES WHICH IRREBUTTABLY ASSUME THE INCOME OF THE MAN IN THE HOUSE TO BE AVAILABLE.

1. *Arizona Revised Statutes, Sec. 8—§46-294, Amount of Assistance,* effective July 1, 1969 (Stepparent & MARS)

The amount of assistance which a recipient may receive shall be determined in accordance with section 46-207, except that the income of any adult, whether or not related to the family, who lives with and as a member of the family and whose needs are included in computing the assistance payment and who shares in the benefits of the assistance payment, shall be considered as income to the family. For purposes of this title only, the income of an unmarried son or daughter under twenty-one years of age shall be disregarded to the full extent permitted under the federal Social Security Act.

2. *New Hampshire Revised Statutes Annotated §167:2-b*
[*New*] *Employment of Relatives of Persons Receiving Aid to Dependent Children or Public Welfare Assistance,* effective Sept. 1, 1969 (Stepparent & MARS)

No person who is otherwise eligible for aid to dependent children or public assistance based on financial need shall receive public welfare assistance from the state unless and until all able-bodied adult males, under the age of sixty-five years, except those regularly attending school, related to such person, and

regularly residing in the same household as such person, and legally liable to contribute to the support of such person and not prevented from maintaining employment and contributing to the support of such person by reason of physical or mental disability or other substantial or other justifiable cause, are employed on a full-time basis. The amount or amounts earned by the persons obliged to maintain employment hereunder shall be taken into consideration in determining the level of need for aid to dependent children or public assistance. Nothing in this section shall be so construed to deny to any minor dependent child any needed aid to dependent children or public assistance to which he would be otherwise entitled. *Unrelated adult males living in the same household in loco parentis as to any such person seeking aid to dependent children or public assistance shall be obliged to contribute to his or her support to the same extent as the father of such person, and in default thereof, shall be subject to the same penalties as the father of such person would be in such case. If anything in this section conflicts with federal law or regulation related thereto, the federal law or regulation shall take precedence.* (Emphasis added.)

3. *New Jersey Welfare Manual, Part II, §§2330.1 (a) & (b)*

2330. PERSONS INCLUDED IN ADC GRANT IN RELATION TO RECIPIENT COUNT (Stepparent & MARS)

.1 State Policy

a. Family Budget Unit Concept

As provided in the Categorical Assistance Budget Manual, the income and resources of all members of a family budget unit shall be recognized as income and resources applicable to the requirements of the family budget unit.

Under the prescribed budgeting methods the *total* requirements and income of all members of the family are budgeted even though some members are not personally eligible to receive ADC payments (e.g., certain persons living with natural or adoptive parent in non-marital relationship, and ineligible dependent children).

b. Persons Eligible to Have Requirements Included in ADC Grant

In addition to the requirements for the eligible child(ren) (as defined in 2280.2), the requirements of the following persons (when not separately eligible for AB, DA or OAA) shall be included in the grant:

1) The natural or adoptive parent(s) or needy parent-person;

2) The natural or adoptive parent and stepparent;

3) The needy parent-person and spouse.

4. *New York, 18 N.Y. C.R.R. §353.3 (a)(2)(i) in part*: (Stepparent & MARS)

All available and unrestricted income of an applicant or recipient and of the spouse, if in the home . . . shall be pro-rated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refuses to make application for assistance and to have his income so applied against the needs of his family, *the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.* (Emphasis added.)

5. *Oklahoma Public Assistance Manual, §336.2* (MARS)

A child living with an own parent is not deprived by reason of absence from the home if there is in the home a person who has assumed the role of the parent's spouse and whose income is available and sufficient to meet the needs of the child according to the budgetary standards of the Department.

6. *South Dakota, Manual of Department of Public Welfare, Chapter III-5A-17.3,* July 1, 1969 (Stepparent)

Income of Parents or Stepparents of Children in Families Receiving ADC. If the dependent child or children are living in the home of their parents (mother, father or stepparent), then the net earned

income derived from labor or business by those parents is to be considered available to and deductible from the requirements of the dependent child or children to the extent that such income exceeds the requirements of those parents and other children in the household who are dependent upon either parent for their support and who have not attained the age of 21 years, all of which is to be figured on the assistance standard. In a stepparent situation, only that net income received after deduction of support payments actually being made to children from a previous marriage shall be considered deductible. (See III-5A-16, Exempt Income.)

7. *Tennessee, Welfare Manual, Vol. II, p. 346, Para. IV-4,* effective 9-1-69 (Stepparent)

If the mother has remarried and her husband is able-bodied, *AFDC* can *be granted* for the child of the mother's former marriage, or the child born out-of-wedlock, who also shares the home *only if the husband* is contributing to the support of his children who live elsewhere, and his *income is insufficient, according to assistance standards, to support his stepchild after payment is made to his own children.* If he does not contribute to his own children out of the home, AFDC may be approved and/or continued for a period not to exceed 6 months, following marriage, provided his income plus other income in the home is insufficient to meet the needs of the family according to assistance standards.

Tennessee, Welfare Manual, Vol. II, p. 402, §1

The AFDC aid group, in addition to the children for whom AFDC is being requested, *shall* include the parents (natural, *step* or adopted) *who live in the home,* except when the parent is eligible for or receives PA in his own right or has his needs included in the budget of another PA recipient. (Emphasis added.)

III. STATE WHICH REBUTTABLY ASSUMES INCOME OF THE MAN IN THE HOUSE TO BE AVAILABLE.

1. *Washington, Welfare Manual, Vol. II, page 8, §8.54* (MARS)

When an adult male person living with a child and its mother is not married to the mother it shall be the role of spouse to the mother unless reasonable presumed that the adult male person is assuming proof to the contrary is presented by the mother and the adult male person within 30 days of application for assistance.

Unless the presumption is removed the income and resources of the person assuming the role of spouse shall be deemed available to meet the requirements of the child and the mother in the same manner as the income and resources of a natural or adoptive parent. See Section 8.847 and 8.83.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 829.—October Term, 1969

Genever Lewis et al., Appellants, v. Robert Martin, Director of the State Department of Social Welfare of State of California, et al. | On Appeal From the United States District Court for the Northern District of California.

[April 20, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

Appellants are mothers and children who receive welfare assistance under California law.[1] At the time these actions were commenced, California law provided[2] that payments to a "needy child" who "lives with his mother

[1] Some of the plaintiffs sue on behalf of themselves, their children, a man assuming the role of spouse (MARS), and all others similarly situated. There are also intervenors who represent two families, one with a stepfather and another with a MARS.

[2] Calif. W. & Inst. Code § 11351 (1966).

On September 3, 1969, the Governor of California signed into law a new § 11351.5 of the California Welfare and Institutions Code, which became effective November 10, 1969. It leaves unchanged § 11351 and implementing regulations insofar as they apply to a stepfather, but repeals the old § 11351 insofar as it applied to "an adult male person assuming the role of spouse." Under the new law, a MARS "shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement." The new law also provides that, under regulations to be promulgated by the State Welfare Department, the MARS and the mother will be required to present the Department with "all of the facts in connection with the sharing of expenses . . . ."

and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her"—known in the vernacular as a MARS—shall be computed after consideration is given to the income of the stepfather or MARS.[3] The California law conclusively presumes that the needs of the children are reduced by the amount of income available from the man in the house whether or not they are in fact available or actually used to meet the needs of the dependent children.

Following our decision in *King* v. *Smith*, 392 U. S. 309, HEW promulgated a regulation reaffirming its earlier rulings that the income of a man not ceremonially married to the mother of the dependent children may not be treated as available to the children unless there is proof that he has made actual contributions.[4] Even where the man is ceremonially married to the mother but is not the real or adoptive father, his income may not be treated as available to the children unless he is legally obligated to support the child by state law.[5]

These suits by appellants were brought in a three-judge District Court to declare the California law and regulations invalid. That court dismissed the complaints, holding the HEW regulations were invalid. — F. Supp. —. The cases are here on appeal and we noted probable jurisdiction. 396 U. S. 900.

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[3] The California regulations which governed a MARS at the time these suits were brought were Cal. State Dept. of Social Welfare, Public Social Services Manual §§ 42–535 (effective Nov. 1, 1967), 44–133.5 (effective July 1, 1967). As to a stepfather, the pertinent regulations were *id.* §§ 42–531 (effective Nov. 1, 1967), 44–113.242 (effective July 1, 1967).

For criminal sanctions against a natural father who fails to support his children see Calif. Pen. Code § 270; Calif. W. & Inst. Code §§ 11476, 11477 (1966).

[4] 45 CFR § 203.1.

[5] *Id.*, § 203.1 (a).

The Social Security Act defines a dependent child as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" a specified relative. 42 U. S. C. § 606 (a). This is the Aid to Families with Dependent Children Program (AFDC) which we discussed in *King* v. *Smith*.

The federal statute provides that state agencies administering AFDC plans "shall, in determining need (of an eligible child), take into consideration any other income and resources (of the child) . . . as well as any expenses reasonably attributable to the earning of such income." 42 U. S. C. § 602 (a)(7).

This directive was implemented by a regulation of HEW, effective July 1, 1967, which, as then worded, provided in part:

> "[O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment."[6]

We stated in *King* v. *Smith*, *supra*, at 319, n. 16, that those regulations "clearly comport with" the Act. And as we have noted, shortly after *King* v. *Smith*, HEW promulgated a new regulation[7] which provided in pertinent part:

> "(a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has been deprived

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[6] HEW Handbook of Public Assistance Administration, Pt. IV, § 3131.7. In its present form the regulation provides:

"(ii) . . . in establishing financial eligibility and the amount of the assistance payment: . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 CFR § 233.20 (a)(3)(11), 34 Fed. Reg. 1395.

[7] 45 CFR § 203.1.

of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

"(b) The inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . . [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.* (Emphasis added.)

In other words, the regulations explicitly negate the idea that in determining a child's needs, a stepfather (*i. e.*, a man married to a child's mother who has not adopted the child and is not legally obligated to support the child under state law) or a MARS may be presumed to be providing support.[8]

[8] An exception is a person, where presence is deemed essential to the well-being of the recipient of assistance and who is included in the family budget unit for calculation of need. See 42 U. S. C. § 602 (a)(7) which provides:

"A State plan . . . must . . . provide that the State agency shall, in determining need, take into consideration any other

We said in *King* v. *Smith* that AFDC aid can be granted "only if 'a parent' of the needy child is continually absent from the home." 392 U. S., at 313. If the stepfather or MARS is a "parent" within the meaning of the federal Act, any federal matching assistance under the AFDC program for children living with a MARS or stepfather would not be available to appellants. The three-judge court said that "The HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope." — F. Supp. —. We disagree. We traversed the entire spectrum of that question in *King* v. *Smith*, and find it unnecessary to restate again the legislative history of the relevant statutes. We concluded that Congress "intended the term 'parent' in § 406 (a) of the Act . . . to include only those persons with a legal duty of support." 392 U. S., at 327. And we went on to say:

> "It is clear, as we have noted, that Congress expected 'breadwinners' who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother would benefit the mother's children whom he was not obligated to support.

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income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; . . ."

The so-called AFDC "essential person" is also covered by regulation. See 45 CFR § 233.20 (a) (2) (vi), 34 Fed. Reg. 1394.

> "By a parity of reasoning, we think that Congress must have intended that the children in such a situation remain eligible for AFDC assistance notwithstanding their mother's impropriety." *Id.*, at 329.

That reasoning led us to invalidate Alabama's "substitute father" regulation.[9] Like reasoning leads us to hold, contrary to the three-judge District Court, that the HEW regulation is valid. We only add that HEW might reasonably conclude that only he who is as near as a real adoptive father would be has that consensual relation to the family which makes it reliably certain that his income is actually available for support of the children in the household. HEW may, in other words, reasonably conclude that an obligation to support under state law must be of "general applicability" to make that obligation in reality a solid assumption on which estimates of funds actually available to children on a regular basis may be calculated.

Any lesser duty of support might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction is based, that is to say, not approximate the obligation to support placed on and normally as-

[9] "Under the Alabama regulation, an 'able-bodied man, married or single, is considered a substitute father of *all the children of the applicant* . . . mother' in three different situations: (1) if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation'; or (2) if 'he visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother'; or (3) if 'he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere.' Whether the substitute father is actually the father of the children is irrelevant. It is also irrelevant whether he is legally obligated to support the children, and whether he does in fact contribute to their support. What is determinative is simply whether he 'cohabits' with the mother." 392 U. S. 313–314.

sumed by natural or adoptive parents. That reading of the Act and of *King* v. *Smith* certainly cannot be said to be impermissible.

Our decision in *King* v. *Smith* held only that a legal obligation to support was a necessary condition for qualification as a "parent"; it did not also suggest that it would always be a sufficient condition. We find nothing in this regulation to suggest inconsistency with the Act's basic purpose of providing aid to "needy" children, except where there is a "breadwinner" in the house who can be expected to provide such aid himself. HEW, the agency charged with administering the Act, has apparently concluded that as a matter of current, practical realities, the relationship of the MARS to the home is less stable than that of the stepfather who at least has the additional tie of the ceremonial marriage, and that the likelihood of the MARS's contributing his income to the children—even if legally obligated to do so—is sufficiently uncertain in the absence of the marriage tie, to prevent viewing him as a "breadwinner" unless the bread is actually set on the table. Nothing in this record shows that this administrative judgment does not correspond to the facts. We give HEW the deference due the agency charged with the administration of the Act, see, *e. g.*, *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367, 381; *Zemel* v. *Rusk*, 381 U. S. 1, 11–12. In the absence of proof of actual contribution, California may not consider the child's "resources" to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support.

California on remand is foreclosed from arguing that its assumption-of-income provisions are consistent with the Act as applied to MARS; the State is limited to demonstrating that those provisions may be retained

under the Act as applied to nonadopting stepfathers by showing that the legal obligation placed on such stepparents is consistent with the obligation required by the federal regulation.

Whether in that posture of the case California's laws and regulations are inconsistent with the federal standard is a question that the District Court did not reach. The cases are therefore reversed and remanded so that such an adjudication can be made.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 829.—October Term, 1969

Genever Lewis et al., Appellants, *v.* Robert Martin, Director of the State Department of Social Welfare of State of California, et al.	On Appeal From the United States District Court for the Northern District of California.

[April 20, 1970]

Mr. Justice Black, with whom The Chief Justice joins, dissenting.

In my dissenting opinion in *Rosado* v. *Wyman*, — U. S. —, — (1970), I pointed out that in many lawsuits brought against state welfare authorities by recipients of Aid to Families with Dependent Children (AFDC) the real controversy is not between the AFDC recipients and the State but between the Federal Government and the state government. This case presents precisely that situation. The Solicitor General has informed the Court that the Department of Health, Education, and Welfare (HEW)—the federal agency vested by statute with the duty of insuring that States which receive federal AFDC matching funds abide by the federal requirements—has determined that § 11351 of the California Welfare and Institutions Code is inconsistent with federal AFDC regulations, 45 CFR § 203.1. This California statute provided when this suit was brought that the income of a stepfather or a man assuming the role of a spouse (MARS) to the mother of dependent, needy children shall be considered as available to the children in computing the AFDC assistance to which the children are entitled. The federal regulations, however, in general refuse to assume that the income of a

stepfather or MARS is available to the children in the absence of proof of actual contributions. California admits that there is a conflict between these state and federal provisions but contends that the federal regulations are inconsistent with the requirements of the Social Security Act and that its statute is consistent with the Act. The controversy between these two governments is thus real and substantial. It was for exactly such situations that the Social Security Act provided a comprehensive remedial scheme for resolving disputes between federal and state governments. See 42 U. S. C. §§ 602, 604, 1316. Under this scheme HEW has the power, subject to certain notice and hearing requirements, to terminate AFDC assistance to a State which refuses to conform to the federal policies. In this case, the termination of federal AFDC assistance to California or the credible threat to terminate that assistance in the near future would compel a resolution of the underlying issue in this lawsuit by forcing California either (1) to amend its laws to conform to the existing federal regulations, (2) to challenge HEW's determination of nonconformity in the federal courts as provided in 42 U. S. C. § 1316, or (3) to withdraw from the federally assisted AFDC program. Generally, the Act provides procedures which allow the state and federal governments to resolve their difference either by agreement or by lawsuit. As I stated in my dissent in *Rosado* v. *Wyman, supra,* at —, if the congressional objective in establishing the Act's remedial procedures is to be realized it is imperative that the integrity of these procedures not be undermined by premature lawsuits brought by welfare recipients. I think these remedial provisions of the Social Security Act reflect an unmistakable intent to give HEW primary jurisdiction over technical and difficult welfare issues and that these procedures should be the exclusive ones until they have

been exhausted. Accordingly, in my view it was error for the District Court to assume jurisdiction and decide this case. It is strange indeed to me that the Federal Government has never been made a party to this lawsuit although its interests are deeply involved.

I would add this note of caution, however. The Federal Government has no power under our Constitution to force or coerce a State into disobeying its own valid laws while those laws are still on the books. My concern in this regard arises from my belief that a State, absent some express constitutional prohibition, has power and authority to fix and determine the property relationships and support obligations among persons within its boundaries. I certainly hope that the opinion of the Court today will not be interpreted as compelling a State to violate its own valid laws in order to obtain money from the Federal Government.

When this action was brought challenging the California statute as inconsistent with the federal regulations, HEW was in the process of considering the effect of its new regulations on the California statute. It is now clear that HEW was preparing to rule that the California provision was inconsistent with the federal requirements. If this Court today would vacate the judgment of the District Court, that order would leave HEW free to proceed to settle its controversy with California as Congress has provided. For this reason, and for those stated above, I would vacate the judgment of the District Court and order that the case be dismissed as prematurely brought.

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Mr. Chief Justice Burger, dissenting.

Unlike *Dandridge* v. *Williams*, No. 131, 1969 Term, the administrative procedures provided by statute have not been exhausted here. For this reason HEW's primary jurisdiction remains a bar to the jurisdiction of federal courts over suits brought by welfare recipients. See *Rosado* v. *Wyman*, No. 540, 1969 Term (dissenting opinion of Mr. Justice Black). I therefore join the dissent filed by Mr. Justice Black.